Metro 765, Inc. v Eighth Ave. Sky, LLC
2017 NY Slip Op 30898(U)
May 2, 2017
Supreme Court, New York County
Docket Number: 153063/2016
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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METRO 765, INC.

Index No. 153063/2016

Plaintiff

v

DECISION AND ORDER

EIGHTH AVENUE SKY, LLC, and AC HOSPITALITY, INC., d/b/a THE NEW YORK INN

MOT SEQ 001, 002, 003

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages, inter alia, for breach of a commercial lease and the covenant of quiet enjoyment, and for declaratory and injunctive relief, the plaintiff tenant moves for a preliminary injunction compelling the defendants to repair plumbing and roofing so as to stanch water leakage (SEQ 001) and to consolidate this action with a summary landlord-tenant proceeding entitled Matter of Eighth Ave. Sky, LLC v Metro 765, Inc., pending in the Civil Court, New York County, under Index No. L&T 61696/15-NY (the summary proceeding) (SEQ 002). The defendant landlord Eighth Avenue Sky, LLC (EAS), separately moves pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it for failure to state a cause of action and based on a defense founded on documentary evidence.

The motions for a preliminary injunction and to consolidate

this action with the summary proceeding are denied, and EAS's motion to dismiss the complaint against it is granted in part and denied in part.

II. BACKGROUND

On August 21, 2014, the plaintiff Metro 765, Inc. (Metro), as tenant, entered into a commercial lease with the defendant landlord, Eighth Avenue Sky, LLC (EAS), to operate a Subway restaurant franchise and pizza parlor on the ground floor of EAS's building in Manhattan. At the time that the lease was executed, the defendant AC Hospitality, Inc. (AC), operated a hotel under the trade name The New York Inn on the second through fifth floors of the building. Metro repeatedly complained to EAS that water leaks from above caused property damage and interfered with the operation of its business. Metro commenced this action against both Metro and AC, seeking a judgment declaring that Metro was responsible for repairing the source of the leaks (first cause of action) and breached its obligation under the lease to make those repairs (second cause of action). Metro also seeks a permanent mandatory injunction compelling EAS to make all necessary repairs (third cause of action), make commercially reasonable repairs of the plumbing system, as required by the lease (fourth cause of action), and, in turn, compel AC to make the repairs (fifth cause of action). In addition, Metro seeks

damages to compensate it for property damage and lost profits, alleging that the defendants interfered with its right to quiet enjoyment of the leasehold (sixth and eleventh causes of action), it is a third-party beneficiary under the lease between EAS and AC's assignor and the defendants breached that lease to its detriment (seventh cause of action), EAS fraudulently induced it to enter into the subject lease (eighth cause of action), and it was constructively evicted and partially, actually evicted from the leasehold (ninth and tenth causes of action).

Metro moves for a mandatory preliminary injunction compelling the defendants to make all repairs that are immediately necessary to stanch the flow of water into the leasehold. At a conference before the court, and later at oral argument, the parties agreed to permit Metro to conduct a site inspection and a dye test in order to ascertain whether, as Metro suspected, the leaks emanated from plumbing fixtures in one or more hotel rooms on the second through fifth floors. The test, conducted by Metro's retained plumber in early December 2016, revealed that the suspected plumbing fixtures were not the source of the leakage. Rather, Metro's plumber concluded that water flowed down several open flues installed on the exterior of the first-floor roof immediately above the leasehold, and that there was a potential for some additional water to emanate from a pipe installed in the ceiling immediately above the rear storage area.

According to counsel for EAS, the flues were capped immediately thereafter, and the pipe above the storage area was tightened, thus correcting all problems. Counsel for the plaintiff, however, asserts that, notwithstanding the installation of the flue caps, water occasionally flows down the flues.

III. DISCUSSION

A. PLAINTIFFS' MOTION

1. PRELIMINARY INJUNCTION

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in his or her favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Doe v Axelrod, 73 NY2d 748 (1988). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. See Doe v Axelrod, supra. Metro has demonstrated a likelihood of success on its first, second, third, and fourth causes of action, which respectively seek a judgment declaring that EAS is responsible for repairs to the first-floor roof and the plumbing system in the building and a permanent injunction compelling EAS to make the repairs, since Section 21.2 of the subject lease obligates EAS to maintain the exterior portion of the roof in working

order, and Section 23.2 obligates EAS to make "commercially reasonable efforts to physically repair any Building plumbing systems from which any such leak shall emanate as soon as practicable." However, the proof submitted by Metro does not establish irreparable injury, inasmuch as the suspected plumbing fixtures were not the source of the leaks, and Metro has not submitted proof in admissible form of any continuing leaks emanating from the flues in the first-floor roof since they were capped. Although the balance of equities would otherwise weigh in Metro's favor, since the detriment to its business and property posed by continuing leaks outweighs the cost and effort it would take EAS to repair them, the absence of proof of irreparable harm is fatal to Metro's request for preliminary injunctive relief.

2. REMOVAL AND CONSOLIDATION OF CIVIL COURT PROCEEDING

Both this action and the summary proceeding involve a dispute over EAS's obligation to make repairs and provide Metro with a usable leasehold, and the two matters will together determine all the rights of the parties. See generally Cohen v Goldfein, 100 AD2d 795 (1st Dept. 1984). Metro was free to raise, as defenses to the petition in the summary proceeding, that EAS breached the warranty of habitability, the implied warranty of fitness, and the covenant of quiet enjoyment, and was

free to interpose a counterclaim for money damages arising from EAS's breach of other provisions of the lease. In fact, Metro did assert such affirmative defenses and counterclaims in the summary proceeding, and the Civil Court denied EAS's motion to strike and dismiss them in the context of that proceeding. Thus, the overarching claim of the breach of lease, and its impact upon the rights of the parties, can be resolved in the Civil Court, the preferred forum for landlord-tenant disputes. See Langotsky v 537 Greenwich, LLC, 45 AD3d 405 (1st Dept. 2007); 44-46 W. 65th Apt. Corp. v Stvan, 3 AD3d 440 (1st Dept. 2004); Scheff v 230 E. 73rd Owners Corp., 203 AD2d 151 (1st Dept. 1994). Hence, removal and consolidation are not warranted.

B. MOTION TO DISMISS BY DEFENDANT EIGHTH AVENUE SKY, LLC

Under CPLR 3211(a)(1), dismissal is warranted where the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. See Ellington v EMI Music, Inc., 24 NY3d 239 (2014); Leon v Martinez, 84 NY2d 83 (1994). To determine whether a complaint adequately states a cause of action, the court must "liberally construe the complaint," accept the facts alleged in it as true, and accord the plaintiff "the benefit of every possible favorable inference." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002); see Romanello v Intesa Sanpaolo,

S.p.A., 22 NY3d 881 (2013); CPLR 3026. A motion to dismiss must be denied "if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); Guggenheimer v Ginzburg, 43 NY2d 268 275 (1977). Where the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (Guggenheimer v Ginzburg, supra, at 275), but it must be "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (id.) for dismissal to ensue.

"'A motion to dismiss a declaratory judgment action . . . presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration.'" Matter of Tilcon, Inc. v Town of Poughkeepsie, 87 AD3d 1148, 1150 (2nd Dept. 2011), quoting Staver Co. v Skrobisch, 144 AD2d 449, 450 (2nd Dept. 1988). Generally "'where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied.'" DiGiorgio v 1109-1113

Manhattan Ave. Partners, LLC, 102 AD3d 725, 728 (2nd Dept. 2013), quoting Matter of Tilcon, supra, at 1150; see Minovici v Belkin BV, 109 AD3d 520 (2nd Dept. 2013). Hence, the first through fourth causes of action properly state causes of action for declaratory relief against EAS and, as noted above, Metro has demonstrated a likelihood of success on them.

Metro, however, does not have a cause of action for a judgment declaring that EAS is obligated to compel AC to make all necessary repairs. Evidence submitted by EAS demonstrates that, in an order dated November 29, 2016, and entered in a proceeding entitled Matter of Eighth Ave. Sky, LLC v Euro Budget Hotel, Inc., in the Civil Court, New York County, under Index No. L&T 68359/15-NY, EAS was awarded a judgment of possession of the second through fifth floors of the building against AC's assignor. Thus, AC has no right to enter and no ability to undertake, control, or direct repairs in its former leasehold. As such, the fifth cause of action must be dismissed for failure to state a cause of action against EAS.

The documentary evidence submitted by EAS, which consists of the EAS/Metro lease and the lease between EAS and AC's assignor, conclusively establishes a defense to the sixth through eleventh causes of action as asserted against it. "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). "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, 148 AD3d 609, 609 (1st Dept. 2017). Section 23.2 of the EAS/Metro lease provides that Metro will not be liable for damage, including that attributable to loss or interruption of Metro's business, arising from flooding, leakage, seepage, or other entry of water into the leasehold. It further provides that Metro will not be entitled to assert any claim based on such flooding, leakage, or seepage, and any water condition shall not constitute a partial or total actual or constructive eviction, even if caused by EAS's negligence or gross negligence. Hence, documentary evidence constitutes a complete defense to the sixth, ninth, tenth, and eleventh causes of action against EAS, and those causes of action must be dismissed insofar as asserted against EAS.

The lease between EAS and AC's assignor does not contain any indicia that Metro was an intended or donee beneficiary thereunder. See Girlshop, Inc. v Abner Props. Co., 5 AD3d 141 (1st Dept. 2004). Consequently, the seventh cause of action must be dismissed as against EAS.

Moreover, a fraud claim which, as here, merely duplicates a breach of contract claim, may not be maintained. See Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114 (1st Dept. 1998).

Therefore, the eighth cause of action must be dismissed against EAS.

IV. CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion for a preliminary injunction compelling the defendants to repair the source of water leaks infiltrating into the subject leasehold is denied (SEQ 001); and it is further,

ORDERED that the plaintiff's motion to remove the proceeding entitled Matter of Eighth Ave. Sky, LLC v Metro 765, Inc., pending in the Civil Court, New York County, under Index No. L&T 61696/15-NY, to this court, and thereupon to consolidate it with the instant action is denied (SEQ 002); and it is further,

ORDERED that the motion of the defendant Eighth Avenue Sky, LLC, to dismiss the complaint insofar as asserted against it is granted to the extent that the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh causes of action are dismissed as against it, and the motion is otherwise denied (SEQ 003).

This constitutes the Decision and Order of the court.

Dated: 5/2/17

ENTER:

J.S.C.

HON. NANCY M. BANNON