Empire Room, LLC v Empire State Bldg. Co. L.L.C.

2017 NY Slip Op 31105(U)

May 17, 2017

Supreme Court, New York County

Docket Number: 652017/2013

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
--X
THE EMPIRE ROOM, LLC,

Plaintiff,

- against -

EMPIRE STATE BUILDING COMPANY L.L.C.,

Defendant.
--X

DECISION AND ORDER
Index No. 652017/2013

Mot. Seq. No.: 004

O. PETER SHERWOOD, J.:

In motion sequence 004, defendant Empire State Building Company LLC ("ESB") moves for summary judgment dismissing plaintiff's claims and granting its counterclaims.

I. BACKGROUND

Plaintiff The Empire Room, LLC ("The Empire Room") as tenant and ESB as landlord executed a fifteen-year lease dated May 26, 2009 (the "Lease"), whereby plaintiff was to occupy commercial storefront ground floor space at the Empire State Building (the "Premises") for use as a bar and lounge known as "The Empire Room" (plaintiff's statement of undisputed material facts ["PSUMF"] ¶ 1; defendant's statement of undisputed material facts ["DSUMF"] ¶ 1 [collectively, "SUMF"]). Plaintiff vacated the Premises on May 30, 2013, before the expiration of the Lease (SUMF ¶ 5).

In the Second Amended Verified Complaint ("SAVC"), The Empire Room alleges that it was effectively forced out of the Premises after ESB erected an exterior elevator (the "Hoist") and scaffolding (the "Scaffolding") that plaintiff claims substantially damaged its business (*see* SAVC ¶ 10-11, NYSCEF Do. No. 112). The Empire Room asserts that ESB breached Article 4 (N) of the Lease by erecting the Scaffolding in a way that "materially impair[ed] or materially restrict[ed] free access to the . . . Premises [and plaintiff's] show windows and/or its signs" and by failing to "use commercially reasonable efforts to cause such Scaffolding to be removed as quickly as reasonably practicable," in breach of Article 4 (N) of the Lease (Lease, Article 4 [N], NYSCEF Doc. No. 115). Plaintiff also alleges that defendant has wrongfully failed to return the security deposit.

ESB maintains that its use of the Scaffolding fully complied with the requirements of Article 4 (N). Its use of the Hoist was made necessary by defendant's plans to modernize and improve the building, which included plans to refurbish the only two elevators available to bring freight into the building. ESB contends that once it became clear the Hoist was necessary, the location of the Hoist was effectively mandated by various logistical, structural and regulatory issues. Similarly, design of the Scaffolding, made necessary by defendant's use of the Hoist, was largely restricted by New York City regulations. Due to defendant's construction needs, neither the Hoist nor the Scaffolding could have been removed prior to plaintiff's departure from the Premises.

ESB asserts that The Empire Room wrongfully abandoned the Premises after it was sued by the City of New York for allegedly employing unlicensed security guards and selling an alcoholic beverage to an underage patron (NYSCEF Doc. No. 82 [answer] ¶ 32). For abandonment of the Premises and violating New York law, ESB asserts a counterclaim for breach of Articles 3 (F), 6, and 16 (A) of the Lease (*id.* ¶¶ 32-36). ESB also asserts counterclaims for rent due and owing under the Lease (*id.* ¶¶ 37-46) and for costs and disbursements (*id.* ¶¶ 47-49). In an amended reply to defendant's counterclaims, The Empire Room asserts two affirmative defenses: (i) that plaintiff was constructively evicted, and (ii) that defendant breached the Lease by failing to remove the Scaffolding as soon as commercially reasonable (NYSCEF Doc. No. 85).

II. ARGUMENTS

A. *Alleged Breach of Article 4 (N) of the Lease Claim*

Article 4 (N) of the Lease provides that the landlord will not be liable for erecting scaffolding outside the Premises "in connection with work being performed at the Building" so long as (i) such scaffolding is "erected in a way so as not to materially impair or materially restrict free access to the . . . Premises, [plaintiff's] show windows and/or its signs" and so long as (ii) defendant "use[s] commercially reasonable efforts to cause such Scaffolding to be removed as quickly as reasonably practicable." The SAVC alleges ESB violated both requirements of this provision (*see* SAVC ¶¶ 10-11, 14)

On this motion, ESB argues that under the first clause of Article 4 (N), it was entitled to erect the Hoist and Scaffolding, and that under the second clause it properly left the Scaffolding in place beyond the date in which plaintiff left the Premises, May 30, 2013.

Under its first argument (free access), defendant notes that no provision of the Lease prohibits ESB from closing a lane of vehicular traffic (def's mem in support at 13). Defendant also argues that the SAVC fails to allege that either the Hoist or the Scaffolding "materially restrict[ed] free access" to the Premises and that defendant's photographs confirms this fact (NYSCEF Doc. Nos. 202 and 203). In regard to plaintiff's allegations of a "maze/cave-like corridor" that obstructed plaintiff's doors and windows, defendant again directs the court's attention to photographs of the premises that defendant contends irrefutably disproves plaintiff's allegations (*id.* No. 204). Defendant contends these photographs demonstrate many of the conditions the SAVC complains of occurred at the opposite end of 33rd Street, away from the Premises, which defendant argues is outside the ambit of Article 4 (N)'s "outside of the Demised Premises."

Under its second argument (expeditious removal), ESB maintains that while commercial reasonableness is an issue of fact, plaintiff cannot raise a genuine issue of fact of improper erection of the Hoist in this case. Defendant observes that courts have decided the issue on a motion for summary judgment (*see Morgenroth v. Toll Bros., Inc.*, 2008 WL 909666 [Sup Ct, New York County 2008] [granting defendant's motion for summary judgment where plaintiffs failed to demonstrate how defendant "failed to use commercially reasonable efforts" in purchasing a building "except for the conclusory statement that the. . . Premises could have been purchased for less money"]). ESB asserts that The Empire Room bears the burden of presenting evidence of what is "commercially reasonable" under the circumstances and how defendant failed to meet this standard (*see Leigh Co. v Bank of New York*, 617 F Supp 147, 153 [SD NY 1985]). ESB also notes that a "contractual requirement to act in a commercially reasonable manner does not require a party to act against its own business interests, which it has a legal privilege to protect" (*MBIA Ins. Corp. v Patriarch Partners VIII, LLC*, 950 F Supp 2d 568, 618 [SD NY 2013]).

ESB asserts that it acted in a commercially reasonable way to remove the Scaffolding as soon as reasonably possible and that plaintiff has not raised a material issue of fact that defendant did not. Defendant contends that the evidentiary support plaintiff advances comes from the testimony of its principal, Mark Grossich, and is insufficient to raise a triable issue of fact with respect to whether ESB violated Article 4 (N) (*see* Defendant's Memorandum of Law. at 16-20;

see also id. at 4-10 [summarizing defendant's account of actions taken with respect to the Scaffolding, along with supporting evidence]).

In pursuit of its claim for *breach of contract*, The Empire Room argues that whether there has been a *constructive eviction* is a question of fact to be determined at trial (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]). In his affidavit, Grossich states that "due to the continuous construction activity, the entrance to The Empire Room under the Scaffolding had to be locked and patrons re-routed through the entrance to the lobby of the Empire State Building. Thus the street access was completely cut off" (aff of Mark Grossich ["Grossich aff"] ¶ 17; NYSCEF Doc. No. 240). He adds that "as a direct result of the loss of street access, street of visibility and seriously reduced fast traffic due to the Scaffolding and Hoist plaintiff's business significantly diminished" (*id*, ¶ 19.)

With respect to whether defendant used reasonable efforts to remove the Scaffolding as quickly as reasonably practicable, The Empire Room argues that "whether a party has breached a reasonable commercial efforts clause in a contract is a question of fact which precludes summary judgment" (*id.* at 6, citing *e.g. Samson Lift Tech., LLC v Jerr-Dan Corp.*, 139 AD3d 534, 535 [1st Dept 2016] [finding an issue of fact "as to whether defendant . . . breached the 'reasonable commercial efforts' clause" which precluded summary judgment]). The case and others cited in support stand for little more than the unremarkable proposition that, where there remains an issue of fact, a court should not grant a motion for summary judgment. Plaintiff emphasizes as issues of fact that defendant's architects, Beyer Blinder Belle ("BBB"), recommended against use of the Hoist, that defendant's general manager admitted during his deposition that the Scaffolding was having an adverse impact on business located on 33rd Street, and that ESB conducted a cost-benefit analysis to determine whether it would be profitable for the defendant to continue to use the Hoist, rather than use internal freight elevators (*id.* at 7-8; Feldman aff ¶ 27, exhibit C at ESB-01894).

In its reply, defendant reiterates that it is not required to act against its own business interests under a "commercially reasonable" standard and the fact that it benefitted from the Scaffolding or that it conducted a cost-benefit analysis, does not show a violation of Article 4 (N) (*id.* at 5-6). Defendant also notes that, while BBB raised concerns about the use of the Hoist, those concerns were in reference to the need to protect the landmarked exterior of the Building, not the length of time the Hoist would be needed.

ESB adds that Article 4 (N) provides a bargained-for remedy to plaintiff in the event that the Scaffolding blocks its signs. Specifically, in the event that plaintiff's "exterior signs are wholly or substantially blocked" by the Scaffolding, upon plaintiff's request, defendant will erect and maintain two signs which will hang on the Scaffolding (Lease, Article 4 [N], NYSCEF Doc. No. 115, at p. 15). Defendant argues that Grossich's testimony and the provided photographs demonstrate that defendant fully complied with this requirement (*id.* at 11, citing Frieman aff. exhibit G [Grossich EBT] at 153-154, 164-165, exhibits M, N; NYSCEF Doc. Nos. 197, 203 and 204).

Defendant also notes that plaintiff offers no particulars nor supporting evidence with respect to its claims that street access to The Empire Room "was completely cut off".

B. *Alleged Wrongful Retention of the Security Deposit*

Regarding plaintiff's claim for return of the security deposit, defendant argues simply that it owes nothing because it "holds no security deposit" on behalf of plaintiff. Instead defendant holds a letter of credit from plaintiff's bank pursuant to the Lease. Defendant also argues that plaintiff is not entitled to return of the deposit because plaintiff's breach of the Lease entitles defendant to draw down on the letter of credit. Plaintiff contends that an issue of fact remains regarding what portion of the security deposit each party is entitled to pursuant to Paragraph 30 of the Lease.

C. *Plaintiff's Alleged Breaches of the Lease*

ESB contends that the evidence conclusively establishes that The Empire Room breached the Lease by abandoning the Premises in violation of Articles 3 (F) and 16 (A), by failing to operate The Empire Room in a "first class, reputable manner," in violation of Article 3 (A), and by failing to comply with all applicable laws, order and regulations, in violation of Article 6 (def's mem in support at 21-23).

Article 3 (F) states in relevant part that plaintiff:

> "covenants and agrees that it will occupy the entire Demised Premises, and will conduct its business therein in the regular and usual manner, at least from 12:00 P.M. to 12:00 A.M., seven days a week throughout the term of the Lease . . . [and] that its failure to so conduct its business therein, at any time during the term of this Lease, without the prior written consent of the Landlord, shall constitute a material and substantial default by Tenant under the terms of this Lease"

(Lease at 8-9; NYSCEF Doc. No. 115). Article 16 (A) further provides that if tenant defaults under the Lease "or if the Demised Premises become vacant or deserted," defendant may serve a

30-day notice to cure. Defendant contends that breach of both of these provisions has been established. There is no dispute that plaintiff left the Premises on May 30, 2013 without defendant's consent.

Article 3 (A) of the Lease states that plaintiff will use the premises "solely as a first class bar and lounge" (*id.*, Article 3 [A] [i]), that its use shall be "consistent with the character and dignity of the Building" (*id.*, Article 3 [A] [vii] [a]) and of "first class quality and reputable in every respect" (*id.*, Article 3 [A] [vii] [b]). Defendant asserts it has established that plaintiff breached these provisions through Mr. Bellina's affidavit, which, states *inter alia* that "Plaintiff was simply not a good tenant" and that "The Empire Room was the scene of frequent fights requiring that the police be called. In fact, one of its employees mugged an employee of another tenant" (Bellina aff ¶ 41; NYSCEF Doc. No. 209).

Article 6 requires that the tenant comply with all applicable laws, orders and regulations and states that the tenant will pay any fines that may be imposed on the landlord as a result of the tenant's failure to comply with this requirement (Lease at 13). In support of its allegation that plaintiff breached this provision, defendant references a New York State Liquor Authority enforcement action against plaintiff for numerous violations of state and municipal law. That action eventually lead to the revocation of plaintiff's liquor license on October 3, 2013 (after plaintiff had left the Premises).

In opposition, plaintiff contends that defendant failed to establish a prima facie case of breach since defendant did not provide notice of default under Article 16. Plaintiff also argues that it is not in default of Article 6 as it settled the case with the State Liquor Authority and paid all applicable civil penalties.

D. *Defendant's Damages Claims*

Defendant argues that plaintiff was obligated to continue paying rent after it vacated the Premises, regardless of whether defendant breached. In support of this argument, defendant cites to two cases which state that a tenant's "withholding of rent *while in possession of the premises* was a violation of a fundamental covenant of the lease, regardless of any breach by landlord" (*see Green 440 Ninth LLC v Reade*, 10 Misc 3d 75, 77 [App Term 2005] [emphasis added]; *D'Espresso of 42nd St., LLC v Green 317 Madison, LLC*, 2014 NY Slip Op 30508[U], *4 [Sup Ct, NY County 2014]). These cases are inapposite since neither party disputes that plaintiff ceased paying rent *after it* left the Premises.

Defendant also notes that under Article 5 (A) of the Lease, plaintiff's sole remedy for defendant's breach of the lease is an action for breach of contract. In opposition, plaintiff maintains that once a tenant is constructively evicted, its obligation to pay rent is suspended (*see 85 John St. Partnership v Kaye Ins. Assoc., L.P.*, 261 AD2d 104, 104 [1st Dept 1999]). Plaintiff additionally argues that there remains an issue of fact as to whether defendant is entitled to rent from the date plaintiff surrendered the premises, as defendant may have re-let the premises.

Defendant also moves for summary judgment on its third counterclaim, for indemnification. Under Article 18 (A) of the Lease, defendant is entitled to "reasonable attorney's fees, in instituting, prosecuting or defending any action or proceeding" in connection with plaintiff's default. Plaintiff contends that, since there is still a question of fact regarding whether plaintiff breached the Lease, defendant is not entitled to summary judgment for its indemnification claim either.

III. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact

(*see Rotuba Extruders. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

A. *Defendant's Alleged Breach of Article 4 (N) of the Lease*

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

Article 4 (N) provides that the Landlord may "install scaffolding . . . outside the Demised Premises . . . in connection with work being performed at the Building, and . . . that there shall be no liability of the Landlord to Tenant in connection therewith." Article 4 (N) also provides that the "scaffolding shall be erected in a way so as not to materially impair or materially restrict free access to the Demised Premises" and that "Landlord shall use commercially reasonable efforts to remove the Scaffolding "as quickly as reasonably practicable."

Plaintiff's claim of constructive eviction is barred by the exculpatory provision of the Lease (*see Bd of Mgrs. of the Sarasota Condo. v Shuminer*, 148 AD3d 609 [1st Dept 2017]). Closure of the traffic lane next to the curb materially restricted free access of passengers alighting from vehicles in front of the Premises but such closure was required by the New York City Department of Transportation and thus was outside the control of the Landlord. Show windows and signs in front of the Premises were impaired but the Landlord effectuated the cure provided for in the Lease by erecting and maintaining appropriate signage (*see* photographs, Freiman Aff., exhibits L, M and N; NYSCEF Doc Nos. 202-204).

The issue of whether defendant breached the Lease by failing to use "commercially reasonable efforts to cause . . . [the] Scaffolding to be removed as quickly as reasonably practicable," is a question of fact which precludes summary judgment as to this issue (*see Samson Lift Technologies, LLC v Jerr-Dan Corp.*, 139 AD3d 534 [1st Dept 2016]). The fact that defendant used a Hoist in connection with work being performed inside the building when arguably it could have used one or more of the freight elevators inside the building and performed a cost benefit analysis in February 2014 - - after plaintiff vacated the Premises in May 2013 - - to determine whether to keep the Hoist or to remove it and the Scaffolding, are not breaches of the Landlord's obligation to "cause such Scaffolding [including the Hoist] to be removed *as quickly as reasonably practicable*" (emphasis added). The Hoist and Scaffolding were installed in November 2011. The issue of fact to be tried is whether the Landlord failed to cause those structures to be removed as quickly as reasonably practicable.

B. *Retention of the Security Deposit*

Pursuant to Article 30 of the Lease, plaintiff was required to deliver as a security deposit either a letter of credit in the amount of $136,080.00 (*see* Lease, Article 30 [A]) or $136,080.00 in cash (*see id.*, Article 30 [E]; NYSCEF Doc. No. 115). As plaintiff elected to deliver a letter of credit, defendant argues that the claim be dismissed, there being no "deposit". The defense is baseless because plaintiff would be entitled to cancellation of the letter of credit, which is a cash equivalent, if plaintiff prevails. Plaintiff is not entitled to return of the letter of credit at this point as the questions of whether defendant breached the Lease remains to be determined.

C. *Defendant's Counterclaims*

Defendant alleges that plaintiff breached Article 3's requirements that plaintiff use the premises "solely as a first class bar and lounge" (*id.*, Article 3 [A] [i]), and that its use be

"consistent with the character and dignity of the Building" (*id.*, Article 3 [A] [vii] [a]) and of "first class quality and reputable in every respect" (*id.*, Article 3 [A] [vii] [b]). Defendant's supporting evidence is lacking and explains neither what Article 3 mandates, nor how plaintiff failed to meet the standard (*see* Bellina aff ¶ 41).

IV. CONCLUSION

Defendant's motion for summary judgement dismissing the SAVC is granted to the extent it seeks dismissal of the claim for constructive eviction. Additionally, the claim of plaintiff for breach of Article 4 (N) of the Lease is dismissed except to the extent it seeks an award of damages arising out of a failure of ESB to make commercially reasonable efforts to cause the Scaffolding to be removed as soon as reasonably practicable.

Whether the letter of credit should be cancelled or ESB be entitled to draw down funds therefrom cannot be decided until the breach of contract claim is resolved as The Empire Room may be entitled to damages for breach of contract (*see* Lease, Article 5 [A], NYSCEF Doc. No. 115). This branch of the motion is denied.

As to the first counterclaim alleging violation of Articles 3(A), 3(F) and (6), the motion for summary judgment is denied for the reasons stated above and the failure to show damages.[1] The motion for summary judgment on the second counterclaim for rent arrears through the end of the Lease term is granted as to liability but there remain issues of fact as to the amount, if any, of rent owed, including any rent reductions due as a result of re-letting of the Premises. As to the third counterclaim for attorney fees and expenses under Article 18 of the Lease, the motion is granted although a hearing as to the amount to be awarded will be deferred until the issue that remains to be tried is resolved.

The court has considered defendant's remaining arguments and finds them meritless.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is GRANTED to the extent described in the Conclusion section of this Decision and Order and is otherwise DENIED; and it is further

[1] Plaintiff's claim that defendant's first counterclaim for breach of the Lease is barred for defendant's failure to give notice of the defaults and opportunity to cure as provided for at Article 16 of the Lease is rejected as Article 16 concerns the right of the Landlord to regain possession of the Premises.

ORDERED that counsel for the parties shall appear at initial pre-trial conference on Monday, June 12, 2017 at 2:00 PM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: May 17, 2017

ENTER,

O. PETER SHERWOOD J.S.C.