309 Bakery Corp. v Associated Mut. Ins. Coop.
2017 NY Slip Op 31511(U)
July 14, 2017
Supreme Court, New York County
Docket Number: 159659/2014
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

309 BAKERY CORP.,

Plaintiff,

-against-

ASSOCIATED MUTUAL INSURANCE COOPERATIVE,

Defendant.

Index No.: 159659/2014
DECISION/ORDER
Motion Sequence No. 2

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's motion for summary judgment.

Papers	**Numbered**
Defendant's Notice of Motion	1
Plaintiff's Affidavit in Opposition	2
Defendant's Reply Affirmation	3

Law Office of Craig A. Blumberg, New York, New York (Craig A. Blumberg of counsel), for plaintiff.
Farber Brocks & Zane, Garden City, New York (William R. Brocks, Jr. of counsel), for defendant.

Gerald Lebovits, J.

Defendant Associated Mutual Insurance Cooperative moves under CPLR 3212 for summary judgment. Plaintiff argues that material issues of fact require trial.

Plaintiff, 309 Bakery Corp., leased premises located at 309 Madison Avenue in New York County (the premises) from Alan Abramson, the owner and landlord of the premises. On May 20, 2013, a fire damaged the interior portion of plaintiff's business. The damage to the premises was caused from firefighting activities, water damage, broken equipment and furnishings, and smoke damage. Before the fire, plaintiff retained commercial-property insurance from defendant, a policy covering November 27, 2012, through November 27, 2013 (the AMIC policy). The AMIC policy provides that the insurer is entitled to "loss of income" in the event of a fire.

In its complaint, plaintiff claims that as a result of the fire it suffered a loss of income of $421,128.00, which includes the rent it continued to pay Abramson during the five months that plaintiff was not operating the business. Defendant found that plaintiff's loss of income totaled $124,364.32 and paid plaintiff only $124,364.32. This amount does not include the continued

rent plaintiff paid Abramson. Plaintiff alleges that defendant did not pay the full amount of lost income, $296,763.68, and thus that the defendant breached the insurance contract. Plaintiff is suing for the remaining balance, $296,763.68.

Defendant now moves for summary judgment. In support of its motion, defendant alleges that the AMIC policy excludes charges and expenses that do not necessarily continue during the time of interruption. Discontinuing expenses are expenses that a business is not required to pay when the business is temporarily inoperative. (*See* Defendant's Notice of Motion, Exhibit D, at 20-21.) According to the AMIC policy, loss of income does not include discontinuing expenses. Defendant further alleges that the rent plaintiff paid during the five months of restoration and interruption of its business should be considered a discontinuing expense because the commercial lease between Abramson and plaintiff provides that plaintiff not pay rent if the premises is "wholly unusable." (*See id.* at 38-40.) Defendant alleges that the premises was "wholly unusable."

In opposition, plaintiff alleges that it was required to pay rent under its commercial lease to Abramson during the period of restoration and interruption. Plaintiff contends that because the damage was confined to the premises' interior and that no damage existed to the structure of the building or to the building itself, Abramson required plaintiff to pay rent. Plaintiff complied and paid the rent.

Defendant's summary-judgment motion is denied. Defendant's motion for summary judgment under CPLR 3212 "shall be granted if, upon all papers and proof submitted, the cause of action . . . shall be established sufficiently to warrant the court, as a matter of law, in directing judgment in favor of any party." The moving party must make a prima facie showing of entitlement to judgment as a matter of law and show sufficient evidence that a material issue of fact does not exist. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985].) Defendant must show that no material issues of fact exist. (*Id.*)

Issues of fact exist about whether plaintiff was required to pay rent to Abramson. Defendant's argument that plaintiff's lease provides that plaintiff was not required to pay rent is unavailing. A court must avoid interpreting a lease that would render a provision ineffective. (*Two Guys from Harrison NY v SFR Realty Assn*, 63 NY2d 396, 403 [1984].) A court must give the contract's words their fair and reasonable meaning (*Albanese v Consol. Rail Corp.*, 245 AD2d 475, 477 [2d Dept 1997].) Also, a court must construe a contract to determine the parties' reasonable expectations. (*See Patrick v Guarniere*, 204 AD2d 702, 704 [2d Dept 1994].)

Plaintiff's lease with Abramson, clause 9, the destruction, fire and other casualty clause, provides:

> "(b) If the demised premises are partially damaged or rendered partially unusable by the fire or other casualty, the damages thereto shall be repaired by and at the expense of Owner and the rent and other items of additional rent, until such repair shall be

> substantially completed, shall be apportioned from the day following the casualty according to the part of the premises which is usable."
>
> "(c) If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty then the rent and other items of additional rent as hereinafter expressly provided shall be proportionally paid up to the time of the casualty and thenceforth shall cease until the date when the premises have been repaired and restored by Owner. . ."
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> * * *
>
> "Tenant acknowledges that Owner will not carry insurance on Tenant's furniture and/or furnishings or any fixtures or equipment, improvements, or appurtenances removable by Tenant and agrees that Owner will not be obligated to repair any damage thereto or replace the same."

Here, the fair and reasonable meaning of the lease section (c) provides that if the premises are "totally damaged" or rendered "wholly unusable" by fire or other casualty, the tenant need not pay rent or additional rent until the owner repairs and restores the premises.

In support of its motion, defendant relies only on the language of plaintiff's lease. Gary Bowers, Vice President of Finance at AMIC, testified at his examination before trial that in partly denying plaintiff's insurance claim, he relied only on the lease, specifically the fire clause. He determined that plaintiff was not required to pay rent for the period of time the business was inoperable. (*See* Defendant's Notice of Motion, Exhibit C, at 37-39.) Similarly, Sharon Jankiewicz, Vice President of Claims at AMIC and an attorney, interprets plaintiff's lease to mean that rent is a discontinuing expense. (*See id.* at 42-43.) Aside from the testimony of these witnesses — who relied on the lease to conclude only that because plaintiff was not operating its business, it was wholly unusable — defendant fails to show, either with caselaw or with evidence, that the interior damage to the premises would render the premises "wholly unusable" and warrant Abramson to abate the rent.

Plaintiff argues, in opposition, that Abramson required plaintiff to pay rent. Plaintiff relies on Abramson's affidavit. Abramson explains that "there was no building damage as a result of the fire, and as the damage was confined to 309 Bakery's equipment, furniture, and fixtures, I denied the request for a rental abatement and advised Mr. Tenedios that pursuant to the terms of the lease, the rent was to continue." (Plaintiff's Affidavit in Opposition, Affidavit of Alan Abramson, Nov. 28, 2016, at 2.) Also, plaintiff alleges that he spoke with his own counsel, who informed him that plaintiff was required to pay rent. (Plaintiff's Affidavit in Opposition, Affidavit of Steve Tenedios, Nov. 4, 2016, at 4.)

The court cannot tell from the conflicting evidence whether plaintiff was required to pay rent. Material issues of fact require a trial.

Accordingly, it is

ORDERED that defendant Associated Mutual Insurance Company's motion for summary judgment is denied; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on defendant.

Dated: July 14, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.