C.N. Fulton Deli, Inc. v Beway Realty LLC
2004 NY Slip Op 30381(U)
September 24, 2004
Supreme Court, New York County
Docket Number: 102123/04
Judge: Harold B. Beeler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 9

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C.N. FULTON DELI, INC.,

Plaintiff,

- against -

Index No. 102123/04

BEWAY REALTY LLC,

Defendant.

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BEELER, J.:

Plaintiff tenant operates a delicatessen and fast food restaurant on part of the ground floor in a building owned by defendant. Plaintiff alleges that defendant landlord is interfering with its business and attempting to force it out of the building. Defendant landlord makes a pre-answer motion to dismiss the complaint.

Plaintiff's predecessor-in-interest operated the same business as plaintiff. According to the landlord, when the lease (Lease) was about to expire in 2002, the predecessor-in-interest wanted to extend the term. The landlord explained to the predecessor that it planned to renovate the entire building, "a mammoth construction project which would cause a tremendous disruption in business in the Building" (Koeppel Affidavit [Aff.], ¶ 4). The landlord planned to add floor space to the building by filling in the main courtyard. The landlord alleges that the predecessor-in-interest agreed to assume the risk that the renovation would disrupt its business in exchange for a reduced rent.

The predecessor-in-interest and the landlord entered into a Lease Extension and Modification Agreement (Lease Extension), which extended the term to February 28, 2007. The

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Lease provides that the tenant

> "understands and acknowledges that Owner is performing a building-wide renovation of the Building ... and that the annual rents set forth hereinabove contemplate the work to be performed and the possible disturbance to Tenant's business. There shall be no abatement of rent or additional rent as a result of inconvenience, noise or disturbance caused by any work to be performed by Owner as part of this renovation"

(Lease, ¶ 5).

Subsequently, plaintiff purchased the business. On December 5, 2002, plaintiff and the predecessor-in-interest, with the landlord's consent, entered into an Assignment and Assumption of Lease, whereby plaintiff assumed the Lease and agreed to be bound by its terms.

On November 18, 2003, the workers who were performing the renovations broke the gas line in the building, and the gas supplier turned off the gas. Gas was not restored until December 26, 2003, according to plaintiff, or January 27, 2004, according to defendant. Without gas, plaintiff alleges, the restaurant could not operate and was forced to temporarily close, losing a great deal of revenue.

When the gas line broke, plaintiff allegedly learned for the first time that defendant had not obtained the gas permit needed to use the stove in the restaurant. Plaintiff alleges that when it assumed the Lease, defendant knew that the building did not have the gas permit and intentionally withheld this information. Plaintiff alleges that it would not have assumed the Lease if it had known that the premises had no gas permit. Defendant claims that the Lease assigns the responsibility of obtaining the gas permit to the tenant. According to defendant, it repaired the gas line within one week of its breaking, and immediately thereafter asked the supplier to restore the gas. The supplier initially refused, allegedly because plaintiff did not have

a gas permit.

The parties are also engaged in a dispute over plaintiff's ventilation system. The stove in the restaurant is connected to a vent which emits hot air and fumes into a courtyard between the building and adjacent buildings. Plaintiff alleges that, on January 7, 2004, it met with defendant's manager, who informed them that the ventilation system would be disabled during the renovation. Plaintiff told the manager that it would be willing to invest money in the building to pay for a new ventilation system, in exchange for an extension of the lease term. Allegedly, the manager promised to consider this request, and also agreed to waive the December 2003 rent and give plaintiff more time to pay the January 2004 rent.

On February 2, 2004, the manager allegedly told plaintiff that the newly renovated building would have no place for the restaurant. The manager said that a new ventilation system would be installed and would not be linked to the restaurant.

The landlord claims that plaintiff or its predecessor installed the ventilation system in violation of the Lease. The landlord claims that it discovered the existence of the vent while doing the renovations. The tenant replies that the vent has long been in the building, that it was used by the predecessor who could not have operated the stove without a vent, and that the landlord has long known of the vent.

Plaintiff further alleges that the telephone services in the building have often been disrupted by defendant's construction. Each time this happens, plaintiff loses business because people cannot call it to make orders.

On February 5, 2004, defendant served a three-day notice on plaintiff. The notice demanded that plaintiff pay the rent due from December 2003 through February 2004, and that, if

the rent was not paid before February 11, 2004, plaintiff should surrender the premises or defendant would commence a summary proceeding.

Plaintiff explains that it did not pay the rent because its business was closed as a result of defendant's negligence and failure to comply with the Lease. Also, defendant allegedly promised to forgive the rent for December 2003. Plaintiff commenced this action, asserting causes of action for a permanent injunction, a *Yellowstone* injunction, specific performance of the Lease, breach of contract, breach of the covenant of quiet enjoyment, fraudulent inducement, violation of General Business Law § 349, and negligent misrepresentation.

Defendant moves for dismissal, pursuit to CPLR 3211 (a) (1) and (7). On a Section (a) (7) motion to dismiss for failure to state a cause of action, the movant must demonstrate that the complaint states no ground for liability, despite being presumed to be true and regarded in the light most favorable to the plaintiff (*Leon v Martinez,* 84 NY2d 83, 87 [1994]). On such a motion, the court does not assess the complaint's merits, but merely determines whether it states the elements of a legally cognizable cause of action (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). A Section (a) (1) motion to dismiss on the basis of documentary evidence will not succeed unless the evidence is "such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Scadura v Robillard,* 256 AD2d 567, 567 [2d Dept 1998]).

First Cause of Action for a Permanent Injunction and Second Cause of Action for a *Yellowstone* Injunction

The first cause of action seeks a permanent injunction ordering defendant to comply with the terms of the Lease, including keeping the ventilation system connected to the premises. The

second cause of action seeks a *Yellowstone* injunction pending a determination that plaintiff was entitled to withhold rent because of defendant's misconduct, and because defendant agreed to forgive some rent.

Previously, the court denied plaintiff's motion for a preliminary injunction and a *Yellowstone* injunction. In response to that motion, defendant submitted an affidavit stating that it had no intention of dismantling plaintiff's vent because the vent does not physically enter the courtyard which the landlord plans to fill in. Injunctive relief is appropriate where there is a strong likelihood of future wrongdoing (*see Lex Tenants Corp. v Gramercy N. Assoc.*, 288 AD2d 48, 49 [1st Dept 2001]; *Greenfield v Schultz*, 251 AD2d 67, 67-68 [1st Dept 1998]), which did not exist at the time of plaintiff's motion. The court denied the motion in a decision dated February 26, 2004, stating that the ventilation issue was moot.

The decision also stated that the underlying dispute concerned the nonpayment of rent, which might give rise to a summary nonpayment proceeding, during which plaintiff would have an opportunity to cure any default for nonpayment and save its tenancy. Therefore, a *Yellowstone* injunction was not required. A *Yellowstone* injunction temporarily stays a threatened termination of the Lease and gives the tenant time to cure the reason for the eviction or time to prove that the reason has no merit (*see 225 East 36th St. Garage Corp. v 221 East 36th Owners Corp.*, 211 AD2d 420, 421 [1st Dept 1995]; *Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating, Inc.*, 205 AD2d 421, 423 [1st Dept 1994]). Where the tenant's alleged default is based on nonpayment of rent, however, *Yellowstone* relief is not available, as nonpayment proceedings afford tenants opportunities to cure the default and preserve the lease (*Hollymount Corp. v Modern Business Assoc., Inc.*, 140 AD2d 410, 411 [2d Dept 1988];

Parksouth Dental Group, P.C. v East River Realty, 122 AD2d 708, 709 [1st Dept 1986]).

In the instant motion papers, defendant again emphasizes that the courtyard into which the vent emits is not the one planned to be built over, and that the renovation will not interfere with the vent (Koeppel Aff., ¶ ¶ 7, 10). Defendant asserts that the court's previous decision establishes the law of the case and requires the dismissal of plaintiff's causes of action for the injunctions. However, denials of preliminary injunctive relief lack preclusive effect (*J. A. Preston Corp. v. Fabrication Enter., Inc.,* 68 NY2d 397, 402 [1986]; *Indosuez Intl. Fin., B.V. v National Reserve Bank,* 304 AD2d 429, 430 [1st Dept 2003]). The fact that plaintiff was not entitled to a preliminary injunction does not mean that it may not be entitled to a permanent injunction.

Although defendant states that the renovation will not interfere with the vent, it is silent regarding whether the vent will exist after the renovation. The Lease states that the tenant shall use the premises for a restaurant (Lease, ¶ 2), and plaintiff alleges that it leased the premises with the understanding that it could prepare hot food. The landlord points out that the Lease says nothing about ventilation. However, for a landlord to agree that a tenant shall operate a restaurant, presumably with a stove, and to then contend that the tenant has no right to ventilation is not reasonable. Given the landlord's argument that the Lease does not require it to supply ventilation for the stove and that the installation of the vent violated the Lease, the court cannot now determine that an injunction regarding the vent may never be appropriate. The court finds that a cause of action for a permanent injunction to prevent the landlord from removing the vent has been sufficiently stated.

The second cause of action, for a *Yellowstone* injunction is dismissed as unnecessary. If

plaintiff later determines that one is needed, it can move for it without the cause of action.

Third Cause of Action for Specific Performance of the Lease

Claiming that the Lease obligates defendant to obtain a permit to use gas on the premises and to maintain a ventilation system, plaintiff seeks the appropriate specific performance. Plaintiff has established that specific performance may be appropriate regarding the vent. Respecting the gas permit, defendant points to the part of the Lease that provides that the tenant, at its sole expense, shall comply with all laws, directions, and regulations of all government departments "which shall impose any violation, order or duty upon Owner or Tenant with respect to the demised premises" (Lease, ¶ 6). Generally, the owner of a building is obligated to comply with all laws affecting the property (*Josam Assoc. v General Bowling Corp.*, 135 AD2d 502, 503 [2d Dept 1987]; *Bush Term. Assocs. v Federated Dept. Stores*, 73 AD2d 943, 944 [2d Dept 1980]). Whether this particular burden is placed on the tenant or landlord is not here indicated. If the court eventually determines that the law places the burden on the landlord, there arises a question as to whether it can be shifted to the tenant. As the clause does not unambiguously provide that the tenant is responsible for the gas permit, this cause of action will not be dismissed.

Fourth Cause of Action for Breach of Contract and Fifth Cause of Action for Breach of the Covenant of Quiet Enjoyment

Plaintiff alleges that the telephone disruptions, lack of gas, and the other inconveniences and disruptions caused by the renovation constitute breaches of the Lease and of the covenant of quiet enjoyment. Plaintiff argues that although the exculpatory provision in the Lease speaks of a building-wide renovation, it does not reveal the scope of the renovations. Plaintiff alleges that it

did not bargain for the extent of inconvenencies that it experienced.

Plaintiff should have known that there would be dirt and noise and some annoyance and inconvenience because of the renovations. On the other hand, a landlord has a duty to use reasonable efforts to minimize interference with the tenant's use and occupancy while renovating. Whether the landlord exceeded its rights under the Lease is a question of fact. If the landlord did so, plaintiff may be entitled to compensation, notwithstanding the exculpatory clause permitting renovations (*Bijan Designer for Men, Inc. v St. Regis Sheraton Corp.,* 142 Misc 2d 175, 179 [Sup Ct, NY County], *affd* 150 AD2d 244 [1st Dept 1989]). Plaintiff has a cause of action for breach of contract.

To establish a breach of the covenant of quiet enjoyment, a tenant must show either an actual or constructive eviction (*Witherbee Court Assoc. v Greene,* 7 AD3d 699, 702 [2d Dept 2004]). The landlord causes an actual eviction by preventing the tenant from having physical possession of the leased premises (*Barash v Pennsylvania Term. Real Estate Corp.,* 26 NY2d 77, 82-83 [1970]). Constructive eviction occurs when the landlord does not physically exclude the tenant, but "the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*id.* at 83). The tenant must abandon possession in order to claim that there was a constructive eviction (*id.*).

Plaintiff alleges that the restaurant was closed when the gas was turned off. A temporary closure of business can constitute the abandonment needed to establish constructive eviction (*see Manhattan Mansions v Moe's Pizza,* 149 Misc 2d 43, 47 [Civ Ct, NY County 1990] [repeated need to close the shop held a constructive abandonment of the premises]). Therefore, plaintiff has a cause of action for breach of the covenant of quiet enjoyment.

Sixth Cause of Action for Fraudulent Inducement and Eighth Cause of Action for Negligent Misrepresentation

Plaintiff alleges that the landlord fraudulently induced it to enter into the Lease by failing to disclose that it had not secured the gas permit required for operation of a stove on the premises. To establish the former, plaintiff must prove Con Ed's misrepresentation of a material fact to plaintiff, with knowledge, deception, and consequent injury (*United Safety of Am., Inc. v Consolidated Edison Co. of New York, Inc.*, 213 AD2d 283, 285 [1st Dept 1995]). Where the defendant has a duty to disclose material facts, fraud may be predicated on concealment (*P.T. Bank Cent. Asia,* 301 AD2d at 376) or on silence (*Mobil Oil Corp. v Joshi,* 202 AD2d 318, 318 [1st Dept 1994]). A viable claim of negligent misrepresentation requires allegations of a confidential or special relationship between the parties (*Kimmell v Schaefer*, 89 NY2d 257, 263-265 [1996]). "[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*id.* at 263). In addition, the circumstances constituting the fraud must be stated in detail, and will be dismissed if they are not supported by "specific and detailed allegations of fact in the pleadings" (CPLR 3016 [b]; *Callas v Eisenberg,* 192 AD2d 349, 350 [1st Dept 1993]).

Plaintiff does not allege any details regarding the alleged fraud, or that it had any contact at all with defendant before assuming the Lease. Nor is there anything here to support the existence of a special relationship or a duty to speak on defendant's part. Even if the responsibility of obtaining a gas permit belonged to defendant, plaintiff has no cause of action for fraud or negligent misrepresentation.

Seventh Cause of Action for Violation of General Business Law § 349

Plaintiff alleges that defendant's failure to speak of the lack of a gas permit is actionable under Section 349 (a) of the General Business Law, which encompasses deceptive acts or practices in the conduct of any business, or in the furnishing of any service. The statute governs consumer-oriented conduct and, on its face, applies to virtually all economic activity (*Karlin v IVF America*, 93 NY2d 282, 290 [1999]). Although the statute is designed to aid consumers, it also applies to disputes between businesses, albeit with severe limitations (*Cruz v NYNEX Info. Resources,* 263 AD2d 285, 290 [1st Dept 2000]). To establish liability under the statute, a plaintiff must prove that the challenged act or practice was consumer-oriented, that it was materially misleading, and that plaintiff was injured as result thereof (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). A consumer-oriented action has a broad impact on consumers at large, not just on the complainer (*id.*). Private contract disputes, unique to the parties, for example, do not fall within the ambit of the statute (*id.*).

Here, plaintiff does not allege that defendant's actions affected anyone except itself. It fails, therefore, to state a cause of action under General Business Law § 349. This cause of action is dismissed.

To conclude, it is

ORDERED that defendant's motion to dismiss the complaint is granted as to the second, sixth, seventh, and eighth causes of action and is otherwise denied; and it is further

ORDERED that defendant is to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that a Preliminary Conference shall be held on Tuesday, November 9, 2004 at 2:00 PM in Room 304, 71 Thomas Street.

DATED: **September 24, 2004**

ENTER:

HAROLD B. BEELER, J.S.C.

HAROLD BEELER
J.S.C.