West End Special Opportunity Fund, LP v Park 55 Assets, LLC

2008 NY Slip Op 31957(U)

July 8, 2008

Supreme Court, New York County

Docket Number: 0603592/2006

Judge: Louis B. York

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 7/11/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: YORK Justice PART 2

WEST END SPECIAL OPPORTUNITY FUND

- v -

PARK 55 ASSOCIATES

INDEX NO. 603592/06

MOTION DATE

MOTION SEQ. NO. 2

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/8/08

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------x

WEST END SPECIAL OPPORTUNITY FUND, LP and WEST END FINANCIAL ADVISORS, LL

Plaintiffs,

-against-

PARK 55 ASSETS, LLC,

Defendant.

----------x

Index No. 603592/06

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK, J.:

This action arises out of disputes between defendant-lessor Park 55 Assets, LLC ("Park 55") and plaintiffs-lessees West End Special Opportunity Fund L.P. and West End Financial Advisors, LLC (collectively "plaintiff West End") concerning commercial office space in Manhattan, New York. Plaintiff has moved to dismiss the counterclaims in defendant's Amended Answer under CPLR § 3211(a)(1) and to compel discovery under CPLR § 3124. Defendant has cross-moved for summary judgment on its counterclaims and to dismiss plaintiff's complaint for failure to state a cause of action. For the reasons stated below, the court denies plaintiff's motion to dismiss the counterclaims and to compel discovery, and grants defendant's cross-motion for summary judgment in part.

In May 2005, plaintiff entered into a lease agreement with defendant's predecessor-in-interest for the entire 19th floor of 110 E. 55th Street in Manhattan. The lease term is approximately seven years and nine months, and provides for variable rent ranging from $11,162 to $12,200 per month. The lease provides that plaintiffs cannot sublet the premises without the lessor's consent, and outlines certain

requirements for proposed subtenants. The lease also provides that the lessor may not unreasonably withhold consent to sublease the premises. In the event of a dispute over the reasonableness of withholding consent, plaintiffs have the right to commence an expedited arbitration proceeding against the lessor.

After taking possession, plaintiff furnished the premises and installed fixtures. About a year later, plaintiff sought to sublease the premises, located a subtenant, and at some point in July of 2006, executed a sublease. On June 29, 2006, plaintiff submitted a sublease proposal to defendant, which defendant rejected by letter of July 28, 2006 on grounds that, *inter alia*, the proposed subtenant was not suitable. On August 8, 2006, defendant's counsel sent plaintiff's counsel an email inviting plaintiff to submit additional documentation regarding the suitability of the proposed subtenant, and also stating, "landlord is willing to let your client out of its lease and take back the subject space."

Plaintiff submitted additional documentation to defendant regarding the proposed subtenant by letter of August 10, 2006. Defendant again did not consent to the sublease, and the subtenant then elected to terminate the sublease with plaintiff on August 15, 2006. Subsequently, plaintiff claims, defendant offered to terminate plaintiff's lease by paying plaintiff a $30,000 surrender fee and returning plaintiff's security deposit. Plaintiff prepared, executed, and sent a lease termination agreement ("the first agreement") including these terms to defendant on August 30, 2006. By letter of September 11, 2006, defendant's counsel informed plaintiff's counsel that Park 55 was rejecting the terms of the first agreement, instead proposing that Park 55

> is willing to release West End from all future obligations under the lease, solely on the following conditions: (i) West End immediately surrenders the Premises in its present condition together with all furnishings, and (ii) that West End forfeit its security deposit in the form of an irrevocable letter of credit in the sum of $33,468.24.

By telephone call of September 13, plaintiff's counsel requested to be released from the lease in exchange for *either* the furnishings or the security deposit. Defendant's counsel denied the request in an email on the same date. Also the same date, plaintiff's counsel inquired, "[w]ould the landlord agree to pay us $10,000 for the furnishings?" Again, defendant's counsel denied the request by email. Later on that date, plaintiff's counsel transmitted a letter along with pages of a second lease termination agreement, which indicated acceptance of the terms set forth in defendant's counsel's September 11 letter. On September 14, defendant's counsel wrote to plaintiff's counsel stating, "the Landlord has just advised me that your client's request to be released from the lease in consideration for both the furnishings and the security deposit has also been rejected."

Plaintiff instituted this action after defendant declined to execute this second version of the lease termination agreement ("the second agreement"). Plaintiff seeks enforcement of the second agreement, a declaration releasing it from further obligations under the lease, and damages for breach of the lease contract. Defendant's Amended Answer includes two counterclaims for plaintiff's alleged default under the lease agreement and for attorney's fees. Defendant's counterclaim for default seeks to accelerate rental payments of $860,171.64 due for the remainder of the lease term. In support of its other counterclaim for attorney's fees, defendant points to the attorneys fees provision in paragraph 18 of the lease.

Now, the Court turns to the motion and cross-motion before it. Plaintiff's motion in part seeks to dismiss defendant's counterclaims on documentary evidence pursuant to CPLR § 3211(a)(1), relying on the exchange of correspondence described above. According to plaintiff, the correspondence indicates that there was sufficient offer and acceptance of the terms of the second agreement to constitute an enforceable contract. Plaintiff argues that defendant's counterclaims for rent due must fail because the lease was terminated by this agreement. In opposition to this motion, defendant argues that there was no binding termination agreement and that plaintiff in is in breach of the lease.

A counter-offer is a rejection as a matter of law, rendering any subsequent acceptance inoperative. Jericho Group, Ltd. v. Midtown Development, L.P., 32 A.D.3d 294, 299 820 N.Y.S.2d 241, 246-47 (1st Dept. 2006). Plaintiff contends that it accepted defendant's offer on September 13 when it transmitted the executed second agreement, and that its earlier communications were simply requests for a better offer, and not counter-offers. Defendant, on the other hand, states that plaintiff's requests amounted to counter-offers. An effective acceptance "must comply with the terms of the offer and be clear, unambiguous and unequivocal." King v . King, 208 A.D.2d 1143, 1144, 617 N.Y.S.2d 593, 594 (3rd Dept. 1994). However, "*if the acceptance of an offer is initially unconditional*, the fact that it is accompanied with a direction or a request looking to the carrying out of its provisions, but which does not limit or restrict the contract, does not . . . give it the character of a counteroffer." Valashinas v. Koniuto, 283 A.D. 13, 17, 125 N.Y.S.2d 554, 558 (3rd Dept. 1953), *aff'd*, 308 N.Y. 233, 124 N.E.2d 300 (1954) (emphasis added). Also, "expressions of assent by an offeree, *which contain*

immaterial deviations from the original offer, do not constitute counter-offers." Knapp v. McFarland, 344 F.Supp. 601, 613 (S.D.N.Y. 1971) (emphasis added). In Valashinas, the Court of Appeals held that a letter suggesting a closing date, which had not been previously discussed, but otherwise accepting material terms, was not a counteroffer, but a "suggestion, request or overture" coupled with a valid acceptance. Valashinas, 308 N.Y. 233 at 239. In King, on the other hand, a letter requesting a different timetable for vacating a marital residence was a counter-offer because it failed to express that a proposed agreement would acceptable even if requests for changes were not granted. King, 208 A.D.2d at 1144, 617 N.Y.S.2d at 593.

The critical issue, therefore, is whether either or both of plaintiff's September 13 requests constituted counter-offers and rejections. In the present case, plaintiff did not couple or precede its September 13 requests with an unconditional acceptance. Plaintiff did not make clear that it would accede to defendant's previously proposed terms if defendant did not accept its requests. Plaintiff's requests were not limited to the mode of performing the second agreement, nor were they immaterial deviations, but proposed to alter its essential terms. Plaintiff made no expression of assent whatsoever prior to its purported acceptance of defendant's offer on September 13. Therefore, plaintiff's requests "could be interpreted as requiring . . . assent" and they operated as counter-offers and rejections. See King, 208 A.D.2d at 1144, 617 N.Y.S.2d at 594. Accordingly, the court denies plaintiff's motion to dismiss defendant's counterclaims. See Kitchen & Bath Creations, Ltd. v. Guardian Life Ins. Co. of America, 234 A.D.2d 157, 157, 651 N.Y.S.2d 466, 466 (1st Dept. 1996.)

Next, the court addresses defendant's cross-motion for summary judgment. Defendant argues that it is entitled to summary judgment on its counterclaims because the lease provides for accelerated rent and attorneys fees upon default. While defendant correctly points out that a clause in a lease providing for accelerated rent may be enforceable in some instances, a liability for damages, not rent, survives if the lease has been terminated as defendant contends. Benderson v. Poss, 142 A.D.2d 937, 937, 530 N.Y.S.2d 362, 363 (4th Dept.1988). In addition, "courts will examine the sum reserved under an instrument as liquidated damages to insure that it is not disproportionate to the damages actually arising from the breach." Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573, 577, 415 N.Y.S.2d 800, 800 (1979). Here, defendant has made no showing that awarding over $800,000 in damages would not be disproportionate to its probable loss, especially given that defendant has made no apparent effort to mitigate damages as required under the lease. Absent this showing, the acceleration clause is unenforceable. See Truck Rent-A-Center v. Puritan Farms 2nd, Inc., 41 N.Y.2d 420, 425, 393 N.Y.S.2d 365, 369 (1977). Therefore, the court denies defendant's motion for summary judgment on its first counterclaim. Also, because the court is not granting summary judgment, any award of attorneys fees would be premature. See Garrick-Aug Associates Store Leasing, Inc. v. Wein, 271 A.D.2d 344, 345, 707 N.Y.S.2d 76, 77 (1st Dept. 2000). Therefore, the court denies defendant's motion for summary judgment on its first and second counterclaims.

Defendant's cross-motion also seeks to dismiss plaintiff's complaint for failing to state a cause of action, invoking the substantive standards of a CPLR § 3211(a)(7) motion to dismiss. Plaintiff's complaint includes a first cause of action requesting a

declaratory judgment that the second termination agreement is enforceable and a second cause of action for breach of the second termination agreement. For the reasons stated above, the court concludes that there was no valid offer and acceptance concerning the second agreement. Accordingly, the court severs and dismisses plaintiff's first and second causes of action.

Next, defendant attacks plaintiff's third cause of action based on promissory estoppel. This claim asserts detrimental reliance on defendant's alleged representation that it would discharge plaintiff from the lease if plaintiff would forego arbitration concerning defendant's refusal to approve a subtenant. Plaintiff contends that it decided to forego arbitration and released the proposed subtenant from a sublease, and claims that as a further result, plaintiff moved offices, spent money negotiating a new lease, and incurred legal fees related to drafting the proposed lease termination agreements. To state a viable cause of action for promissory estoppel, plaintiff must allege an unambiguous promise, reasonable and foreseeable reliance on that promise, and an injury sustained in reliance on that promise. Williams v. Eason, 49 A.D.3d 866, 866, 854 N.Y.S.3d 477, 479 (2nd Dept. 2008). Plaintiff has alleged all of these elements, and for purposes this motion, the court must accept them as true. See Sanders v. Winship, 57 N.Y.2d 391, 394, 456 N.Y.S.2d 720 (1982) Therefore, the court denies defendant's cross-motion as it applies to plaintiff's promissory estoppel claim. See Rogers v. Town of Islip, 230 A.D.2d 727, 728, 646 N.Y.S.2d 158, 158 (2nd Dept. 1996).

Plaintiff's fourth cause of action for equitable estoppel adds that defendant made the representations knowing that they were false, and/or that defendant concealed the fact that the alleged promises were conditioned upon its efforts to sell the building.

Defendant argues that plaintiff's actions allegedly in reliance occurred prior to any alleged misrepresentation, but defendant does not factually support this assertion and thus has failed to carry its prima facie burden demonstrating entitlement to judgment as a matter of law on this issue. See Johnson v. CAC Business Ventures, Inc., Slip Op. 05376 (1st Dept. June 12, 2008)(avail at 2008 WL 2369733, at *1). Consequently, the court denies defendant's cross motion as it applies to plaintiff's equitable estoppel claim.

Next, defendant seeks to dismiss plaintiff's fifth cause of action for breach of the lease, which first alleges that defendant wrongfully denied plaintiff's use of the premises on September 28, 2006 and for some period thereafter. Defendant argues that plaintiff was not locked out, instead claiming that plaintiff's difficulty accessing the building on September 28 was due to a malfunctioning access system. Defendant has submitted a letter dated September 28 and addressed to plaintiff's counsel, which states that the access problems were due to "a technical malfunction as to the magnetic key fob reader." The letter also states that "your claim that your client was denied access all month is preposterous, as your client failed to notify you of the landlord of any such denied access, until today." Plaintiff's memorandum in opposition to defendant's cross-motion does not assert that plaintiff had access problems for any other date than September 28. Also, plaintiff has not alleged that any access problems persist. Plaintiff's allegations regarding access problems for a single day do not fit into any cognizable legal theory for breach of the lease, and thus the court dismisses the fifth cause of action as it pertains to the alleged denial of access. See Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 185 (1977). Plaintiff also asserts that defendant removed plaintiff's name from the building directory in violation of the lease.

Defendant does not deny removing plaintiff's name, but plaintiff fails to point to any lease provision requiring maintenance of its name on a building directory. Therefore, the court also dismisses plaintiff's fifth cause of action as it pertains to the alleged removal of its name from the directory.

Defendant also seeks to dismiss plaintiff's sixth cause of action, which alleges that defendant breached the lease by withholding consent to the sublease in bad faith. The implied covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Dalton v. Educational Testing Service, 87 N.Y.2d 384, 389 663 N.E.2d 289, 291 (1995). Defendant had an implied duty to act in good faith when deciding whether to accept a proposed subtenant, and plaintiff has sufficiently alleged a breach of this duty. See 1-10 Industry Associates, LLC v. Trim Corp. of America, 297 A.D.2d 630, 747 N.Y.S.2d 29 (2nd Dept. 2002). Furthermore, paragraph 12(F) of the lease contains a provision that the landlord must not unreasonably withhold consent to a sublease. Therefore, the court denies defendant's cross-motion at it applies to plaintiff's sixth cause of action for breach of the implied covenant of good faith and fair dealing.

Last, the Court turns to the part of plaintiff's motion seeking to compel discovery. Plaintiff originally moved to compel discovery on March 16, 2007. Plaintiff withdrew this motion without prejudice by stipulation and order dated February 15, 2008. The motion to included an affidavit of counsel of a good-faith effort to resolve discovery disputes as required by NYCRR § 202.7. On May 7, 2007, defendant responded to plaintiff's First Request for Production of Documents.

In addition, defendant has provided at least some responses since the March 2007 motion to compel. Plaintiff contends that the documents produced were not sufficiently responsive, while defendant argues that plaintiff never made a good-faith effort to resolve any alleged problems with the response. While plaintiff stresses that it already filed a good faith affidavit with its previous motion, plaintiff may not rest on this affidavit, but must file a new NYCRR § 202.7 statement indicating a good-faith effort to resolve any disputes as they currently stand. See Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 382, 788 N.Y.S.2d 349, 351 (1st Dept. 2005). Plaintiff has failed to submit this new affidavit. Therefore, the court denies plaintiff's motion to compel discovery.

Based on the above, therefore, it is

ORDERED that plaintiff's motion to dismiss defendant's counterclaims and compel discovery is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted to the extent of severing and dismissing plaintiff's first, second, and fifth causes of action, and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 8, 2008

ENTER:

LOUIS B. YORK, J.S.C.

FILED
JUL 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK
J.S.C.