14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp.
2010 NY Slip Op 34025(U)
January 8, 2010
Supreme Court, Bronx County
Docket Number: 302591/09
Judge: Mark Friedlander
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 1A-25

14 BRUCKNER LLC,

Plaintiff,

-against-

14 BRUCKNER BLVD. REALTY CORP.,

Defendant.

MEMORANDUM DECISION/ ORDER
Index No. 302591/09

HON. MARK FRIEDLANDER:

Defendant 14 Bruckner Blvd. Realty Corp., the owner of a commercial property, moves to dismiss the amended complaint served by plaintiff 14 Bruckner LLC, the tenant on such premises. Because the two parties herein have similar names, to avoid confusion, the movant will be referred to as defendant or landlord, and the opponent of the motion will be referred to as plaintiff or tenant.

The complaint herein was served together with an order to show cause seeking a Yellowstone Injunction ("YI"). The Court granted a preliminary injunction, subject to certain conditions, in a previous order herein dated May 22, 2009. Plaintiff, in general terms, seeks to avoid the termination of its lease on the premises known as 14 Bruckner Boulevard, Bronx ("the subject premises").

I. Background Facts.

In 2002, defendant, as owner of the subject premises, granted plaintiff's predecessor in interest ("PPII") a long term (49 year) lease covering the entire building. There is no question that the lease involved is a commercial lease. More than four years after the start of the lease, plaintiff began withholding rent, as a result of a dispute with defendant over the structural condition of the building. Plaintiff, which had (through PPII) inspected the building prior to entry into the lease, and which had, under the terms of the lease, accepted the

subject premises "in the condition and state in which (it is) now" (in other words, "as is"), nevertheless argued that the building contained defects so egregious and hidden that they could not have been discovered in advance and that defendant purposefully hid such defects from the tenant. According to plaintiff, in order to continue its use of the subject premises, it was forced to make emergency repairs at enormous expense to it, and it thereafter began deducting rent as a set-off for its repair costs.

Defendant, in addition to asserting defenses based on plaintiff's pre-lease inspection and on plaintiff's acceptance of the premises as is, also argues that the lease expressly forbids set-offs, or the diminution of rent payments for any similar reasons. Defendant's affiant also claimed, in opposing the YI, that the lease was drafted by the tenant, a claim not refuted by the tenant in any papers submitted, either on the initial motion, or on the instant application. Both parties hereto are sophisticated investors in real property.

In March 2009, the landlord issued a notice to cure to its tenant, seeking both the rent arrears (together with late charges, as required by the lease) and compliance with lease requirements on mandatory insurance coverage. Under the terms of the document, if tenant failed to cure its alleged breach, the notice would ripen into a Notice of Termination. It appears that the issue of insurance coverage has since been resolved satisfactorily by the tenant, and that the issue of the rent withholding remains as the main factor inciting the conflict.

The issue before the Court is no longer whether or not a preliminary injunction should issue. Injunctions of the type sought here, to preserve the occupancy rights of a commercial tenant during the pendency of a dispute, are based on the decision in First National Stores v. Yellowstone Shopping Center, 21 N.Y.2d 630. When this Court issued the preliminary injunction, it noted the relatively relaxed standards for the granting of such relief. Now, however, with the submission of a dismissal motion, the question at hand is the viability of plaintiff's claims. If those claims cannot stand, there remains no active dispute. In such instance, no permanent injunction is merited, and the preliminary injunction must be vacated.

II. The Complaint and the Dismissal Motion.

Plaintiff's complaint, dated April 2009, contains five causes of action. The first seeks to void the Notice of Termination ("NT") previously served on the tenant by the landlord. The second seeks a permanent injunction preventing termination of the lease and/or any eviction proceeding against the tenant. The third appears to seek damages of five million dollars for the expenses sustained by the tenant in repairing the alleged defects in the premises and for legal expenses. The fourth seeks damages of five million dollars for the alleged fraud of the landlord in failing to inform tenant of the latent defects. Finally, the fifth cause of action again seeks five million dollars in damages for the negligent failure of the landlord to inform the tenant of the latent defects and dangerous conditions complained of. The last two causes of action also seek five million dollars each, as punitive damages.

Movant seeks dismissal of each and every one of the causes of action asserted against it, on the grounds that: 1) The claims are time-barred; 2) The claims are precluded by the terms of the lease, including plaintiff's acceptance of the premises "as is;" 3) The claims as to fraud and misrepresentation are not pleaded with sufficient particularity and the claim in the third cause of action, to the extent it sounds in breach of contract, does not assert the necessary elements of such claim; and 4) The first cause of action, to the extent it asserts fatal defects in the wording and service of the NT, raises issues already decided against plaintiff in this Court's May 2009 order.

Plaintiff opposes each and every prong of the arguments set forth by defendant. Particularly, plaintiff argues that the statute of limitations does not preclude the claims set forth in the complaint, because such claims are defensive in nature, and raised for the sole purpose of preventing an eviction which the landlord has threatened only within the last year, when the NT was served. Further, according to plaintiff, an "as is" clause cannot prevent the raising of issues as to willful concealment of dangerous conditions by the landlord.

In the first instance, it must be noted that movant errs in reading the first cause of action as solely

addressed to drafting defects in the NT. A reading of the totality of paragraphs 13 through 16 of the amended complaint, as well as the introductory paragraphs preceding those, makes clear that plaintiff asserts the nullity of the NT based on all of the grievances which it has against defendant, including the substantive issues revolving around the condition of the premises. Thus, a ruling against plaintiff, upholding merely the technical sufficiency of the NT, would not necessarily suffice to compel the dismissal of the first cause of action (or the second).

III. The Issue of the Validity of the NT.

Because the issue of the adequacy of the NT has already been addressed in the Court's previous decision, it will be dealt with first herein. The parties argue strenuously over whether the Court's previous ruling on this subject constitutes the "law of this case." Plaintiff maintains that the May 2009 ruling against it, on this single issue, made in the course of the grant of a YI, does not necessarily carry over to the remainder of this action. Defendant disagrees. Yet, it makes little difference whether the earlier ruling can or should be viewed as law of the case. Such characterization would be relevant if the instant motion were submitted to a judge other than the undersigned, who might then be concerned as to whether he or she had the latitude to disagree with the previous ruling.

In the instant situation, however, the same judge is called upon to decide an issue as to which he already opined. Nothing in plaintiff's presentation on this motion persuades the Court that plaintiff has offered a basis for re-arguing the result reached earlier on this very subject. Therefore, there is no reason whatsoever to suppose that the Court will now find the NT to be defective. For purposes of completeness, the Court will set out once again what was said regarding this issue in the May 2009 decision:

"Plaintiff, inter alia, challenges the sufficiency of the notice to cure which was served by the landlord. The Court finds no merit in such challenge. Tenant first claims that the notice improperly combines a notice to cure with a notice of termination. The Court finds that the actual notice sent here merely informs the tenant of

the consequences of tenant's failure to cure. The notice is conditional in its wording as to possible termination and is quite clear in its import. It engenders no confusion whatsoever. The tenant is asked to cure the alleged breaches of the lease, and is thereafter told that failure to cure by a certain date will result in termination. The Court cannot divine how such a straightforward recitation of appropriate information could be labeled defective. The precedent relied on by the tenant in no way supports the conclusion that the instant language is either ambiguous or equivocal.

Plaintiff next charges that the notice to cure is defective because it provides two different dates for curing the alleged breaches and for possible termination. It is asserted that the notice is thus fatally confusing. The Court, however, finds nothing confusing about the scheme set forth in the notice to cure. It is clear that the landlord is giving the tenant some additional time to resolve the issue of obtaining and/or producing the required insurance policy, while holding the tenant to a tighter schedule in the demand for the withheld rent. This Court has had occasion over the years to engage in the painstaking review and interpretation of many confusingly drafted documents. This is not one of them. Tenant's attempts to argue otherwise are entirely unpersuasive.

Finally, plaintiff cannot argue that the notice was improperly mailed when it was sent to the address set forth in the lease for communications between the parties, and when plaintiff never served notice on defendant as to an address change for such purpose. The question of whether some agent of defendant had knowledge of plaintiff's new address becomes irrelevant under such circumstances, and particularly where, as here, the document served was admittedly ultimately received in time for the recipient to make the initial motion seeking a YI."

For all of the above reasons, the Court concludes (as it has concluded once before) that the notice to cure (and hence the NT) was properly drafted and served.

IV. The Statute of Limitations.

Movant seeks dismissal of the first, second, fourth and fifth causes of action, on the ground that the statute of limitations has expired (Brief, p.6). The parties do not seriously dispute the dates involved. The subject lease was entered into on December 11, 2002. The alleged defects in the premises were discovered by plaintiff no later than February 7, 2007, as is conceded in the affidavit submitted by plaintiff's managing member. Movant points out that a claim for fraud must be brought within six years of the fraudulent act or within two years after discovery of the fraud. CPLR 213. The instant action was initiated after February 2009. There can be little doubt that the alleged fraudulent act took place at or before the lease signing, or before the end of 2002. Thus, the claim for fraud is brought more than six years after the alleged act of misrepresentation, and more than two years after the admitted discovery of the claimed misrepresentation.

The same limitation period that applies to the claim of fraudulent misrepresentation applies as well to the fifth cause of action, sounding in negligent failure to inform. Fandy Corp. v. Lung-Fong Chen, 262 A.D.2d 352. Thus, a comparison of the dates involved would seem to mandate dismissal of the fourth and fifth causes of action as time-barred. By contrast, defendant does not make clear the precise basis for seeking to bar the first two causes of action as untimely.

It would seem at first blush that a 2009 claim as to the validity of a 2009 NT, and an application for protection from such NT, are timely asserted. Yet, if the basis for such claims cannot be any inherent defect in the NT (as this Court has ruled supra), the only remaining ground for the claims is the very same event which forms the basis for the fraud claim, to wit: the actions of the landlord at or before the signing of the 2002 lease. As such, the claims which form the basis for the first two causes of action run aground against the very same time bar (CPLR 213) that affects the last two causes of action.

Plaintiff counters that it cannot be time barred because it is asserting the claims defensively, to preclude its ouster from the premises. It asserts that the "relation back" provisions of CPLR 203(d) permit the

maintaining of these facially time-barred claims. However, the Court finds this argument to be untenable, if not somewhat bizarre. The relation back provision which plaintiff cites refers to a situation in which an action has already been initiated by an opposing party, leading to the need for the defender to assert a defensive counter-claim which would be time-barred in the absence of the already existing lawsuit. Here, there is no existing lawsuit by the landlord which would entitle plaintiff to evade the strict mandates of the statute of limitations in asserting counter-claims or defenses.

The cases cited by plaintiff do not support its proposition that it can blithely ignore the requirements of CPLR 213. Most of the precedent cited is either irrelevant, or diametrically opposed to plaintiff's argument. Wilen v. Harridge, 94 A.D.2d 123, contains no statute of limitations issue, as the claims asserted therein were all timely. In Brink's, Inc. v. New York, 533 F.Supp. 1122, an action had already been initiated and the claim in question was a reply to a counter-claim. The claims in 133-24 Sanford Ave. Realty v. Cisneros, 940 F.Supp. 83, were adjudicated under federal law and the court there made clear that, under New York law, a different outcome would be mandated. Finally, in 118 East 60th Owners v. Bonner, 677 F.2d 200, a case decided under New York law (and cited in 133-24 Sanford, supra), the court reached an outcome directly opposite to that advocated by plaintiff. In similar fashion, the remaining cases cited by plaintiff are inapposite.

It might be more logical (but no more helpful practically) for plaintiff to argue that the claims it belatedly asserts are inextricably linked in time to the 2002 date of signing of the lease, because plaintiff seeks to void the lease. However, plaintiff here is in the anomalous position of seeking to enforce a lease that it claims was fraudulently made. This renders it all the more of a reach for plaintiff to claim that its current claims of fraud and negligent misrepresentation relate back to the issue of enforcing the 2002 agreement allegedly produced by such fraud.

As defendant rightly points out, plaintiff had the option of bringing most of these claims in 2007 or 2008, after discovering the alleged defects in the premises. It chose not to do so. Instead, it elected the risky

remedy of withholding rent and awaiting the landlord's reaction. The fact that the landlord waited until the expiration of the statute on plaintiff's claims before it served the NT does not give the tenant the right to avoid the period of limitations. The timing of the NT may reflect caginess on the landlord's part, if it was pre-meditated, but it can equally be thought of as merely good lawyering.

In any event, plaintiff's arguments as to "relation back" could only apply to the first two causes of action, in which plaintiff is in fact acting defensively. In each of the last two causes of action, plaintiff seeks five million dollars in damages, plus punitive damages. Those claims are clearly not within the ambit of plaintiff's sole argument against the time-barring of his causes of action.

By reason of the foregoing, the Court finds that plaintiff's first, second, fourth and fifth causes of action are time barred.

V. The Effect of the Lease Terms.

Even if the above claims were not time barred, they would remain untenable by reason of the second defense raised by movant, that the claims are precluded by the specific terms of the lease. It must be emphasized that, as set forth supra, the parties hereto are both sophisticated holders of significant interests in real property, and that, to date, no one has denied the contention that the lease was prepared by the tenant. Although the lease may have been prepared by the original tenant, which is not a party hereto, the present tenant (plaintiff), to whom the lease was assigned a mere two months after its initial signing, stands in the shoes of the draftsman, with all the rights and obligations of such assignor. Finally, the lease itself gives evidence of being carefully negotiated, with several post-signing modifications, executed by the parties and containing pen-and-ink additions, which were initialed by the signatories.

a. The Lease Provisions.

The lease has been described supra as offering the property in as "as is" condition, but this summary formulation does not suffice to describe the terms under which the leasehold was conveyed. Section 5 of the

lease contains an express representation that the tenant had examined the property, was fully familiar with the physical condition of it, and accepted the premises without recourse to the landlord. Further, the section declares that the landlord made no representation or warranty, express or implied, as to the nature or condition of the leased premises. The next section requires that the tenant make all repairs, including structural repairs, ordinary or extraordinary, foreseen or unforeseen. Finally, section 3 of the lease requires the payment of all rents by the tenant, without counter-claim, set-off, deduction or defense.

If there is a contractual text that would have precluded, in advance of the event, each and every aspect of tenant's claim, more fully than the above language, the Court cannot think of it. In the face of the terms to which the tenant agreed, plaintiff now bears a significant burden, if it seeks to undermine the clear provisions of the lease for the purpose of justifying its withholding of rent and forestalling the termination of its occupancy. To say that the burden has not been met would be an understatement.

b. Plaintiff's Showing in Opposition.

The affidavit of plaintiff's managing member, submitted in opposition to the dismissal motion, falls far short of the required submission of a party with first-hand knowledge of the facts. The affiant, Bradford S. Barr ("Barr") asserts that the building sustained fire damage prior to the date of the lease, but even if such assertion is relevant, it is not shown to be true to the satisfaction of the Court. There is no information as to how this fact is known to Barr, or as to what investigation was done to determine when the fire occurred or even whether it was known to this landlord. More glaring than that is the statement by Barr that he was "informed by engineers" that there were latent defects in the premises, which posed a significant hazard. Barr does not identify the engineers, or submit an affidavit from any one of these supposed experts. Barr goes on to describe supposed defects, but it is not clear whether he has personal knowledge of any of them, or whether these items were described to him by the unnamed "engineers."

In short, all of the detail provided is unacceptable hearsay, which cannot suffice to oppose a dismissal

motion based on clear documentary evidence. Further, in view of the clear provisions of the lease, tenant, at the very least, was required to submit an expert affidavit for the purpose of showing that tenant could not have reasonably discovered the allegedly latent defects during its pre-lease inspection of the property. After all, the very purpose of an inspection, if conducted by an appropriate expert, is to uncover just the type of latent problem described by plaintiff here. Obvious problems can be seen by anyone. The purpose of hiring expert inspectors is to have available the possibility of surveying structural underpinnings of a premises, and just such inspection would be appropriate, if not expected, from a party embarking on a 49-year lease.

An expert's affidavit would also have been necessary to support tenant's claim that the landlord deliberately repaired the fire damage in a way which was intended to hide such damage from the prospective tenant, a claim which, as currently asserted, remains entirely speculative. No such expert affidavit was included in the opposition papers submitted by plaintiff.

It is noteworthy that Barr asserts (par. 8) that the premises had to be shut down during the repairs, by order of the New York City Department of Environmental Protection ("DEP"). This is interesting because Barr does not go so far as to claim that the shutdown was required by the alleged defects. It is possible to infer that the shutdown may have been required solely by the extent of the repair process itself, as decided by the tenant. By contrast, in plaintiff's brief (p. 3), the claim is made that the DEP shutdown was "as a direct result of the latent defects." The account in the brief is unsworn, and by counsel. It can only be inferred from the above that the sworn account by Barr was carefully worded, and limited in its claims, and that the proof adduced from it must be limited to what the affiant is willing to state on personal knowledge.

c. Findings as to the Proof Offered.

In the Barr affidavit and elsewhere, plaintiff can point to no affirmative statement by any agent or representative of the landlord that would constitute a misrepresentation of the condition of the premises. To the contrary, the lease, as signed, shows that no such representation was made. Plaintiff can only hope to infer

from the scope of the repairs needed, what the landlord "must have known," or what the landlord "must have done." Once again, the assertions of plaintiff, without expert support, constitute no more than wishful thinking as to its remedies, and reflect no more than its chagrin at the failure of this experienced commercial party to exercise caution in advance, either by contractual negotiation or by more complete inspection, for the purpose of protecting itself from unforeseen eventualities. Even with expert testimony, it is not clear that these claims could have been rescued from the specific disclaimers to which the tenant acceded in the lease. Certainly, however, with only bald, speculative assertions in the opposition papers, the lease provisions must prevail.

The Court noted, in its May 2009 order, that the landlord "has a powerful argument for dismissal and/or summary judgment under the facts described in these voluminous papers. But those considerations are not now before the Court..." The Court gave the parties a chance to have these issues decided in the context of a dismissal motion, so that all parties could further amplify their claims and submit briefs addressed to the issue of dismissal.

d. Case Law Cited by the Parties.

Plaintiff's brief cites various cases in purported support of the proposition that an "as is" clause might be insufficient to preclude a remedy where a purchaser (or lessee) discovers a hidden defect. However, each and every case cited by plaintiff refers to a simple "as is" clause that is effectively limited to the two word phrase by which it is labeled. By contrast, movant cites cases in which the claims of hidden defect were denied, because the contractual provisions governing the transfer contained precisely the type of more extensive language which is found in the instant case. See Weiss v. Shapolsky, 161 A.D.2d 707.

In the cases cited by plaintiff, not only is the disclaimer language limited, but the parties are, for the most part, unsophisticated buyers of private homes and, more importantly, there were specific affirmative misrepresentations, sometimes in writing, made by the sellers as to the premises being "in excellent condition" (Chopp v. Welbourne, 135 A.D.2d 958) or as "having insulation" (Schooley v. Mannion, 241 A.D.2d 677) or

some other specific misrepresentations (Stephens v. Sponholz, 251 A.D.2d 1061). In 17 East 80th Realty v. 68th Associates, 173 A.D.2d 245, the court discussed the finding of fraud based on the hiding of latent defects through construction, but that was a case where the court found, after trial, that dummy vents had been constructed, which did not provide ventilation, but ended in closed off casing. Clearly, plaintiff here has not submitted a proper demonstration of a blatantly fraudulent form of (non-functioning) construction of the type in that case.

For all of the above reasons, the Court concludes that the claims here are precluded by the clear language of the lease which governs the relationship between these parties. By reason of the foregoing, causes of action one, two, four and five, to the extent not already dismissible as time barred, are dismissed as barred by the terms of the lease.

VI. The Third Cause of Action.

The third cause of action is characterized by movant as breach of contract, a characterization apparently adopted by plaintiff in its opposition brief. However, it is not entirely clear from the language of the complaint what the gravamen of that claim is. If it is breach of contract, movant's brief properly shows that the elements of such breach have not been pled. However, the actual language of the complaint shows only that plaintiff is seeking, in the third cause of action, reimbursement for its expenses in repairing the premises, and for its expenses, including legal fees, in combating eviction and litigating the instant case.

The conclusions of this Court, set forth supra, as to the effect of the terms of the lease, preclude plaintiff from recovering the costs of the repairs it made. Further, plaintiff has not shown that it ever offered the landlord an opportunity to make the repairs. The papers submitted show no demand by tenant that the landlord make the repairs which tenant deemed necessary. Rather, the totality of the motion file seems to bear out that the tenant elected to make all of the repairs that it deemed appropriate, and only later notified the landlord that it would withhold rent as a setoff. It is thus all the more unreasonable that plaintiff now seeks reimbursement

for the amounts it expended, not only because the tenant was required, under the lease, to make any necessary unanticipated repairs on its own, but also because the landlord never was given the opportunity to inspect the alleged defects and determine what repairs it would think necessary in the circumstances then prevailing.

Nor is plaintiff entitled to litigation costs and legal fees, absent a contractual provision providing it to the tenant. The lease, in fact, shows the opposite. Paragraphs 13, 15, 16 and 19 of the lease make clear that it is the tenant (plaintiff) which must reimburse the landlord for all legal fees expended by the landlord by reason of disputes such as the instant one. Consequently, regardless of how the third cause of action is characterized, it has no basis in fact or law, based on the documents before the Court, and must be dismissed.

VII. Remaining Issues and Conclusion.

Movant also seeks dismissal of the fourth and fifth causes of action, as pleaded with insufficient particularity. In view of the conclusions reached supra, such arguments by movant are effectively moot. However, the Court will note that, as has been demonstrated above, the fraud claims herein are pleaded based on innuendo rather than fact, and this would be an insufficient basis for establishing such claim.

By reason of the foregoing, defendant's motion is granted in all respects and plaintiff's claims are dismissed. Defendant's brief makes reference to its demand for costs and attorney's fees (p.14) and these seem to be compensable to defendant under the terms of the lease, as indicated supra. However, any judgment incorporating such costs and legal fees must be accompanied by a detailed affidavit showing hours spent and charges therefor.

Settle judgment.

Dated: 1/8/10

MARK FRIEDLANDER, J.S.C.