VBH Luxury, Inc. v 940 Madison Assoc., LLC
2011 NY Slip Op 33412(U)
December 13, 2011
Supreme Court, New York County
Docket Number: 111342/2007
Judge: Debra A. James
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SCANNED ON 12/23/2011

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

VBH LUXURY INCORPORATED,

Plaintiff,

- v -

940 MADISON ASSOCIATES, LLC,

Defendant.

Index No.: 111342/2007

Motion Date: 12/13/11

Motion Seq. No.: 008

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

_______________________.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s). 1
Notice of Cross Motion/Answering Affidavits - Exhibits	No(s). 2
Replying Affidavits - Exhibits	No(s). 3

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion are resolved in accordance with the attached Memorandum Decision and Order.

~~This is the decision and order of the court.~~ DAJ

Dated: December 13, 2011

ENTER:

[signature]

DEBRA A. JAMES *J.S.C.*

FILED

DEC 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

CHECK ONE: ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .... MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

-- X

VBH LUXURY, INCORPORATED,

Plaintiff,

Index No.: 111342/2007

- against-

940 MADISON ASSOCIATES, LLC,

Defendant.

-- X

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

DEBRA A. JAMES, J.:

In its complaint alleging breach of contract, plaintiff VBH Luxury, Incorporated moves, pursuant to CPLR 3212, for an order granting partial summary judgment as to liability against defendant 940 Madison Associates, LLC, and to be declared as the party entitled to attorneys' fees. Plaintiff also seeks to strike defendant's affirmative defenses.

Defendant cross-moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the complaint.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff is a "retailer of designer VBH luxury jewelry, leather goods, accessories, fine art and home furnishings," with its store located at 940 Madison Avenue, New York, New York. Defendant landlord is a limited liability company, having a principal place of business at 931 Madison Avenue, New York, New York.

[* 3]

Plaintiff entered into a lease with defendant on June 30, 2001 for the purposes of constructing and opening up its retail store. Under the terms of the lease, plaintiff was granted a rent concession for the first ten months. A typical provision in commercial leases, it allows the tenant to build its store and not have to incur the expense of rent until it is open for business. The base rent was $104,166.00 per month and plaintiff states that it expected to open its store as of January 2002.[1] The store did not open until November 2002.

In August 2007, plaintiff filed a complaint alleging two causes of action. The first cause of action is for breach of contract, and plaintiff states the following:

> As a direct result of Landlord's material breaches of the Lease, VBH Luxury has incurred and continues to incur significant construction and repair expenses, has sustained and continues to sustain substantial damage to its image and has suffered and continues to suffer lost profits, the amount of which damages will be determined at trial, but which are believed to be no less than $8,000,000.00.

The second cause of action is for breach of the implied duty of good faith and fair dealing. Plaintiff reiterates the same facts as in the first cause of action, and also seeks the same amount of damages.

According to the plaintiff, the defendant breached the lease in many ways and plaintiff sustained damages as a result. The

[1]The proposed opening date in the plaintiff's other papers submitted to the court was February 2002.

record contains a "plaintiff's designation of expert witness" report, which sets forth what plaintiff's expert, James Lynch (Lynch) will testify with respect to alleged damages. According to plaintiff, Lynch's testimony will include the following:

> Mr. Lynch is expected to testify as to the economic damages sustained by plaintiff as a direct consequence of: (I) defendant's delay in approving building permits and applications to governmental agencies; (ii) defendant's failure to timely cure a pre-existing New York City Landmarks Preservation Commission violation; (iii) defendant's failure to provide adequate heat to the leased premises; (iv) defendant's defective workmanship on the leased premises; and (v) defendant's failure to make timely repairs. The damages calculated are strictly based upon a lost profit theory that does not include any provisions for professional expenses, legal costs and/or punitive damages. In total, plaintiff sustained economic damages in the amount of at least $1,477,000.
>
> Furthermore, Mr. Lynch is expected to testify that plaintiffs (a) sustained actual property damage, including actual repair costs, and (b) overpaid the lease, in the amount of at least $52,580.[2]

The alleged breaches of the lease set forth by plaintiff can be grouped into four different categories.

Boiler:

Plaintiff points to the section of the lease which provides that the landlord agrees to "install by September 1, 2001 a heating system in the basement in an area mutually agreed which will minimize any disruption of and interference with Tenant's

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[2]Lynch also states that plaintiff did not have access to certain space that was allegedly indicated on the lease, and that thereby plaintiff was overcharged for rent in the amount of approximately $3,000. This claim is not addressed by plaintiff in its memoranda of law.

use and occupancy of the basement of the Demised Premises."

Plaintiff claims that the defendant breached the lease by not installing a new boiler by September 1, 2001. Plaintiff alleges that it "urgently" notified the defendant about fixing the boiler, and provides correspondence between the two parties. Plaintiff states that defendant did not install a new boiler until May 2002.[3] Plaintiff maintains that this was a breach of the lease since it allegedly "significantly delayed the completion of the build-out of the store." Moreover, according to plaintiff, defendant was disruptive when it was installing the heating system.

In response, defendant claims that it fixed the boiler before the store opened. It continues that it was actually plaintiff who had impeded access for defendant to fix the boiler. Defendant alleges that the plaintiff's contractors refused to allow the plumber to perform his work.

Delays for Signatures and Curing Violations:

Plaintiff continues that the defendant further breached the lease by delaying its required signatures on applications for construction permits. According to plaintiff, defendant should have signed these applications in September or October 2001, but did not do so until December 2001. This delay purportedly halted

[3]Plaintiff's complaint states that the defendant did not install a new boiler until October 2002.

construction on the retail store and deprived the plaintiff of taking advantage of the rent concession at a time when it was not receiving revenue.

To demonstrate this breach, plaintiff specifies the part of the lease which states the following, in pertinent part, "[w]henever in this Lease provisions require consent or approval, or that something must be done to the satisfaction of a party, then such party shall not unreasonably withhold or delay giving such consent or approval or indicating such satisfaction."

In response, defendant contends that plaintiff submitted its signed construction application to the New York City Department of Buildings (DOB) on November 26, 2001. Defendant also noted that plaintiff did not take into consideration the time it takes for a landlord to review an application and that "even a turnaround time of several months is not uncommon in this industry."

Plaintiff further contends that the New York City Landmarks Preservation Commission refused to allow plaintiff to install signs due to a prior violation with the building which had not been cured by defendant. Apparently, defendant had installed a steel window sash which should have been replaced with one that would match the details of the historic window. Plaintiff alleges that, despite asking multiple times, the defendant did not cure this violation until July 2003. The part of the lease

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referring to curing violations sets forth, in pertinent part: "[l]andlord will cure promptly all violations of record in the Building, unless same does not interfere with Tenant's use."

Defendant alleges that it was not the delay of the landlord which caused problems, but that it was due to construction problems and poor management thereof. Defendant points to a letter written from plaintiff to its contractor, in which plaintiff indicates that the landlord was not the one responsible for the delays. Defendant further notes that a new contractor needed to finish the job, as the original one did not stay until the construction was complete.

Specifically, as to this violation, defendant claims that plaintiff signed the lease to rent the premises "as is", and that the entire time the violation was there, plaintiff was still able to perform construction. Finally, defendant claims that it cured the violation in October 2002, before the store opened.

Property Damage due to the Pipes:

Plaintiff alleges that it incurred substantial property damages due to leaking pipes. For instance, plaintiff claims that in June 2003, the stockroom and kitchen area of the store were damaged when faulty storm pipes backed up. Additionally, plaintiff claims that in April 2004, it "sustained substantial damage to its store as a result of a water leak coming down through the mezzanine level closet and then to the ground floor

fitting room." Plaintiff alleges that the leaks are still present.

Plaintiff alleges that such property damage arose from defendant's breach of the lease in that it was defendant's responsibility to maintain the pipes in good condition. In its support, plaintiff points to the section of the lease which provides that the "[l]andlord shall maintain in good condition, order and repair (a) roof, gutters, the stone exterior, load bearing walls and other structural elements of the Building and (b) the Building systems including the heating system serving the Demised Premises except for those installed by Tenant."

Defendant maintains that it did not breach the lease since, according to the lease, plaintiff assumed all the risk. There were several "no liability" provisions written into the lease and signed by both parties. For instance, a provision in the lease with respect to the pipes, sets forth the following, in pertinent part:

> The Landlord shall not be liable for any failure of water supply or electrical current ... nor for any injury or damage to person or property caused by the elements or by other tenants or persons in said building, or resulting from steam, gas, electricity, water, rain, or snow, which may leak or flow from any part of said buildings, or from pipes, appliances or plumbing works ... .

Roof Damage:

Plaintiff alleges that its roof was damaged and that defendant left it in disrepair. In December 2003, plaintiff

claims that it wrote a letter to defendant in which it complained that "the ceiling of the lower level in the VBH Luxury boutique [was] once again leaking ... from the water boiler installed and maintained by you [the Landlord] for the building pursuant to the terms of the lease."

In response to plaintiff, defendant acknowledges that it was responsible for the maintenance of the roof and heating system, but claims that the responsibility for repairs for the rest of the building, including the pipes, remained with the plaintiff.

Plaintiff Allegedly Breached Lease:

Defendant also alleges that, in actuality, it was the one who was in compliance with the lease, and that it was plaintiff who breached the lease. Defendant maintains that plaintiff did not pay rent and that defendant had to threaten eviction before plaintiff resumed payments. In addition, defendant contends that plaintiff did not timely pay for its contractors, which was in breach of the lease. Defendant provides an example of one of the contractor's placing a mechanic's lien on the property for unpaid material furnished.

In response, among other things, plaintiff alleges that defendant's principal contradicted himself in his deposition, and testified that defendant never gave plaintiff any written notice of default.

In its current motion, plaintiff moves for partial summary judgment. Plaintiff seeks to be determined to be the prevailing party, which would cast defendant in damages for the attorneys fees that plaintiff incurred in prosecuting this action. The lease between the parties indicates that the "prevailing party in any litigation rising under this Lease shall be entitled to reasonable attorneys' fees." Plaintiff also seeks to have defendant's affirmative defenses stricken.

Defendant cross-moves for summary judgment dismissing the complaint.

DISCUSSION

I. Affirmative Defenses:

Plaintiff seeks to dismiss defendant's eight affirmative defenses for having no merit. Although the defendant does not specifically address the affirmative defenses in its motion or reply papers, the court will briefly address each one.

The first affirmative defense asserted by the defendant is that plaintiff's claims are barred by the statute of limitations. This defense is stricken since plaintiff's breach of contract claim was filed within six years from the first alleged breach.

Likewise, the second affirmative defense of laches is stricken since this defense is "unavailable" when the action is commenced within the statute of limitations. *Republic Insurance Co v Real Development Co*, 161 AD2d 189, 190 (1st Dept 1990).

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The third affirmative defense of estoppel is also dismissed since the defendant is not able meet the pleading requirements for claiming a defense of equitable estoppel. Defendant merely states that the plaintiff is estopped from asserting the claims and does not provide any more explanation.

The fourth affirmative defense of waiver is not stricken since, since the defendant asserts that by signing the lease plaintiff waived its right to assert some of the claims in the complaint.

The fifth and sixth affirmative defenses state that plaintiff suffered damages due to the plaintiff's culpable conduct. As plaintiff's causes of action are for breach of contract and do not sound in negligence, such affirmative defenses that plaintiff somehow contributed to its own damages are unavailable. See Board of Education v Sergeant, Webster, Crenshaw & Folley, 71 NY2d 21 (1987). Accordingly, these defenses are stricken.

Defendant's seventh affirmative defense of no liability is no more than a general denial and is stricken as it merely alleges that the terms of the lease provide that defendant was not responsible for damages resulting from leaking pipes.

The eighth defense of "passage of time" correlated with the World Trade Center attack fails to state a cognizable defense and is stricken.

II. Breach of Contract:

The elements of a breach of contract claim are: (1) the existence of a valid contract (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages. *Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 479 (1st Dept 2007), citing *Furia v Furia*, 116 AD2d 694 (2d Dept 1986).

Alleged Economic Damages as a Result of Defendant's Purported Delays:

Plaintiff argues that defendant breached the lease when it delayed in signing an application for construction permits. In support of its argument, plaintiff points to the part of the lease which directs the defendant to not unreasonably withhold or delay giving such consent or approval.

Plaintiff's arguments are unavailing. Defendant has documented that it signed the proposed construction permit applications in November 2001, only a couple of months after it received them. Although this date is disputed by plaintiff, it has provided no evidence that defendant should have signed and reviewed the proposed documents within a certain amount of time as per industry standards. Plaintiff has not shown that the defendant "unreasonably" withheld or delayed signing the documents. Any assertions by the plaintiff as to a specific time line by which defendant needed to comply with signatures are speculative and cannot defeat a motion for summary judgment. *See*

Grullon v City of New York, 297 AD2d 261, 263-264 (1st Dept 2002) (holding that "[m]ere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture or speculation [internal quotation marks and citations omitted])." As such, plaintiff has raised no issue of fact that defendant breached the lease by waiting to sign the proposed construction permits.

Plaintiff has also alleged that its sales were affected when defendant waited to cure a landmarks violation, thereby not allowing plaintiff to put outside signage. However, as with the alleged delay with signing the construction permits, plaintiff does not demonstrate that defendant breached the contract by any purported delay. As defendant maintains, plaintiff was still able to construct its store despite the window-sash violation. The lease does not provide for specific time lines by which defendant must act, and plaintiff does not prove that defendant delayed an unreasonable amount of time.

As for plaintiff's claims that it lost approximately $524,550.00 in sales as a result of not being able to have the appropriate signage, plaintiff does not establish prima facie that it sustained damages as a result of defendant's alleged delay in curing the violation or by the fact that plaintiff was delayed in placing signage.

Moreover, plaintiff is unable to prove lost profits as a result of the delayed opening. Plaintiff's expert alleges that plaintiff sustained damages in the way of lost profits as a result of not being able to open until November 2002, as opposed to the expected opening date of February 2002. Lynch opined that the economic damages sustained as a result of not being able to open were approximately $1,155,068.00. Lynch then added an additional amount of rent that plaintiff paid while not yet open, in the amount of $416,666.00.

As opined by the Court of Appeals in *Bi-Economy Market Inc v Harleysville Insurance Co. of NY*, 10 NY3d 187 (2008):

> It is well settled that in breach of contract actions "the nonbreaching party may recover general damages which are the natural and probable consequences of the breach" (*Kenford Co v County of Erie*, 73 NY2d 312, 319 [1989]). Special, or consequential damages, which "do not so directly flow from the breach," are also recoverable in limited circumstances (*American List Corp v U S News & World Report*, 75 NY2d 38, 43 [1989]). In *Kenford*, we stated that "[i]n order to impose on the defaulting party a further liability than for damages [which] naturally and directly [flow from the breach], i.e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time or prior to contracting" (73 NY2 at 319 internal quotation marks and citations omitted]).

The Appellate Division, First Department has held that "[a] party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable

[* 15]

certainty [internal quotation marks and citations omitted]." *Zink v Mark Goodson Productions, Inc.*, 261 AD2d 105, 105 (1st Dept 1999). The damages must be measured using reliable factors and "without undue speculation." *Id.* at 106. Specifically, when a new business venture is involved, "a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty [internal quotation marks and citation omitted]." *Id.*

As defendant argues, the standard for an award of lost profits is extremely high. Plaintiff, a new business, had never generated any revenue. Therefore, it would be speculating on the amount of profits that it allegedly lost due to the delay in opening the store. As previously stated, speculation cannot defeat a motion for summary judgment. In the present case, "there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty [internal quotation marks and citation omitted]." *Digital Broadcast Corporation v Ladenburg, Thalmann & Co., Inc*, 63 AD3d 647, 648 (1st Dept 2009).

Similar to the other allegations, plaintiff's assertion that the defendant breached the lease by failing to provide the boiler by September 1, 2001, and delaying the installation for nine months, raises no issue of fact with respect to lost profits.

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Plaintiff claims that the store opening was hindered due to the delay in the boiler installation. Plaintiff continues that it could not make a profit since the store was closed due to not having a boiler. However, on this record plaintiff has not demonstrated that the installation of the boiler in May 2002, six months before the store opened, resulted in any lost profits to plaintiff.

Alleged Property Damages:

Plaintiff claims that due to defendant's breach of lease it sustained property damage resulting from leaking pipes and problems with the roof. Plaintiff avers that the maintenance of the pipes and the roof are both the responsibility of the defendant. Defendant claims that, although the roof is to be maintained by defendant, the pipes are the responsibility of the plaintiff. Whether or not the defendant is responsible for the upkeep and/or property damage due to the pipes or the roof, is of no import. Plaintiff signed the lease, wherein it specifically agreed that the defendant is not responsible for any damage that results from water which may leak from any part of the building or from the pipes. Therefore, a bar on recovery for property damage in the event of defendant's breach was explicitly contemplated by the parties in the lease, plaintiff having bargained away its right to seek that particular item of consequential or special damages.

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It is well established that "a contract is to be construed so as to give effect to each and every part," and that the "court should not rewrite the terms of an agreement under the guise of interpretation [internal quotation marks and citations omitted]." *FCI Group, Inc. v City of New York*, 54 AD3d 171, 176,177 (1st Dept 2008). With respect to contract interpretation, the Court of Appeals has held that, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." *W.W.W. Associates v Giancontieri*, 77 NY2d 157, 162 (1990).

Applying the above law to the facts at hand, it is evident that by signing the lease, which it presumably read, plaintiff agreed that it would not recover in breach of contract for property damage arising from leaking pipes or any other failure on the part of the defendant. In exchange for the rent concession in which plaintiff received ten months of free rent, as well as other consideration, plaintiff released the defendant from any liability for consequential damages arising from its breach of lease.

Similar to the lost profits analysis, plaintiff has not established "that the particular damages were fairly within the

contemplation of the parties to the contract at the time it was made [internal quotation marks and citations omitted]." *Digital Broadcast Corporation v Ladenburg, Thalmann & Co., Inc,* 63 AD3d at 647.

Accordingly, the court finds no viable cause of action for consequential or lost profits damages arising out of breach of contract, and such damages are unavailable.

Rent Abatement

In its papers, the plaintiff establishes prima facie that the defendant breached the lease in failing to maintain the roof and heating system, which must await determination by a fact finder. Should a breach be established, plaintiff would be entitled to recover monetary damages representing any diminution in the value of its leasehold, as a function of the rent set forth in the lease, arising out of such breach. *See Salvato v St David's School,* 307 AD2d 812 (1st Dept 2003).

III. Claim for Breach of the Implied Duty of Good Faith and Fair Dealing:

Defendant is granted summary judgment dismissing plaintiff's second cause of action, which is for breach of the implied duty of good faith and fair dealing. This cause of action is duplicative, since it arises from the same set of facts as the breach of contract cause of action. *See Logan Advisors, LLC v Patriarch Partners, LLC,* 63 AD3d 440, 443 (1st Dept 2009).

ORDER

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is granted only with respect to striking defendant's first, second, third, fifth, sixth, seventh and eighth affirmative defenses, and is otherwise denied; and it is further

ORDERED that defendant's motion for summary judgment is granted only to the extent of dismissing plaintiff's claim for consequential damages, i.e. lost sales, lost profits or injury to property, arising out of any breach of lease.

Dated: December 13, 2011

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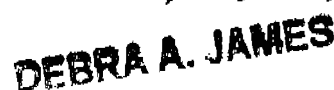

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