Crunch Bushwick, LLC v Reva Holding Corp.
2014 NY Slip Op 33224(U)
December 4, 2014
Supreme Court, New York County
Docket Number: 653763/2013
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

CRUNCH BUSHWICK, LLC, Plaintiff, -against- REVA HOLDING CORP., Defendant.	Index No. 653763/2013 DECISION AND ORDER Motion Sequence No. 003

MELVIN L. SCHWEITZER, J.:

Defendant moves for an order, pursuant to CPLR 3211 (a) (1), (4), and (7), to dismiss the complaint, based on documentary evidence, another action pending, and failure to state a claim, and pursuant to CPLR 6514 (a) and (b), directing the cancellation of the Notice of Pendency filed against defendant's property.

This action involves a dispute over a lease for commercial space in a building owned by defendant, and leased by plaintiff. Plaintiff seeks to open a gym in the leased space, which use violates the temporary certificate of occupancy, and plaintiff has not yet obtained the required public assembly permit. Plaintiff is seeking money damages for fraudulent inducement with regard to the lease, an injunction, and declarations that New York City Department of Buildings (DOB) violations issued regarding the premises were cured, and specifying what it must do with regard to the violation of the certificate of occupancy (CO). Defendant contends that there is another action pending between the parties in this court, and plaintiff has taken its unsuccessful arguments from that action, and rehashed them in the present complaint. It further urges that the claims lack merit, and, thus, the notice of pendency filed by plaintiff should be cancelled.

Background

On September 28, 2012, defendant, as landlord, and plaintiff, as tenant, entered into a written lease (Lease), for plaintiff's use of the second floor of a building at 785 Flushing Avenue, Brooklyn, New York, as a gym (the Premises) (exhibit D to notice of motion, complaint, ¶ 3). Plaintiff advised defendant that, in order to induce plaintiff into entering into the Lease, plaintiff had to be able to open to the public even though the CO might not yet permit plaintiff to operate a gym, and before a place of assembly certificate (PACO) was issued. The Lease provided in paragraph 50 (A) (iv) that:

> "The parties hereto acknowledge that once [plaintiff] obtains said sign-offs and approvals for [plaintiff's] Work but prior to [the Board of Standards and Appeals] Approval, [plaintiff] shall be permitted to open for business prior to the issuance of the BSA Approval and prior to issuance of a certificate of occupancy, temporary or permanent, and [plaintiff] shall be solely responsible for any and all violations, fines and penalties, as a result thereof ..."

(exhibit H to notice of motion, Lease ¶ 50 [A] [iv] at 66). The Lease also provided in paragraph 50 (B), with regard to the PACO, that plaintiff "shall be responsible, at [plaintiff's] sole cost and expense and [defendant] agrees to promptly sign and provide DOB applications, for obtaining and filing the application for the initial [PACO] required in connection with [plaintiff's] change of use application and issuance of an amended [CO]" (*id.*, Lease ¶ 50 [B] at 66). The Lease further provided, in paragraph 47, that plaintiff "shall not at any time use or occupy the Premises in violation of the [CO] issued for the Premises or for the Building," that in addition to rights defendant had under the Lease, plaintiff agreed to indemnify defendant for such use in violation of the CO (*id.*, Lease ¶ 47 at 62). Plaintiff alleges that defendant drafted the Lease, and, at the

time it entered into it, defendant did not intend to allow plaintiff to open prior to the issuance of BSA approval, or the issuance of the CO.

In June 2013, defendant commenced an action before this court, entitled *Reva Holding Corp. v Crunch Bushwick, LLC* (index No. 652287/2013) (the Other Action) in which defendant sought an injunction, enjoining plaintiff from opening up for business and operating at the Premises in violation of the CO and without the PACO (exhibit A to notice of motion). While the action was pending, DOB issued four violations – one that the Premises were being used in violation of the CO, two others for discrepancies between the plans filed with DOB and actual signage that was constructed, and the fourth for failure to have certain building plans on premises and available for inspection (complaint, ¶¶ 42-45). By order dated November 25, 2013, this court granted defendant's motion for a preliminary injunction in the Other Action, after finding that the DOB had issued a violation concerning plaintiff's "illegal gym," and had scheduled a hearing on the violation on December 2, 2013 (exhibit C to notice of motion). This court enjoined plaintiff from "opening for business or otherwise operating at [the Building], in violation of the Certificate of Occupancy and/or without the necessary permits and approvals" (*id.*). Defendant was directed to provide an undertaking of $100,000 as a condition of the injunction, which defendant did.

By letter dated October 15, 2013, defendant notified plaintiff that an "Event of Default" under the Lease would occur unless the DOB violations were discharged within 30 days (complaint, ¶ 46). The occurrence of an Event of Default could form the basis for defendant to terminate the Lease (*id.*, ¶ 47). The 30-day period had been extended, and was set to expire on February 7, 2014 (*id.*, ¶ 48). On December 2, 2013, the hearings were held before the DOB. By

decision and order, dated December 17, 2013, the Environmental Control Board determined that the two violations regarding signage had been corrected, the violation regarding the CO had been correctly issued but did not require immediate corrective action, and the violation regarding the plans had occurred (*id.*, ¶ 51).

In October 2013, plaintiff commenced this action, alleging four causes of action. In the first claim, plaintiff seeks money damages, asserting that defendant fraudulently induced it to enter into the Lease by promising that it could operate the gym for a number of months before its rental obligations commenced (complaint, ¶¶ 31-35). The second claim seeks to enjoin defendant from interfering with the right it granted plaintiff in the Lease to open prior to issuance of the CO and PACO. The third claim seeks a declaration as to whether the Lease can be terminated on the basis of the DOB violations, and specifying what, if anything, plaintiff must do to avoid such termination (*id.*, ¶¶ 41-52). The fourth claim asserts that the notice of the Event of Default was defective, and seeks a declaration to that effect (*id.*, ¶¶ 55-69).

Discussion

The motion to dismiss is granted and the complaint is dismissed. The court will address first the branch of the motion to dismiss for a prior action pending, and then failure to state a claim and documentary evidence, and, finally, cancellation of the notice of pendency.

The branch of the motion to dismiss for prior action pending is denied. Under CPLR 3211 (a) (4), a court has broad discretion to determine whether to dismiss an action on the ground that there is another action pending between the same parties for the same claim (*see Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009]). An action may be dismissed "where there is a substantial identity of

the parties and the causes of action" (*Cherico, Cherico & Assoc. v Midollo*, 67 AD3d at 622 [citations omitted]). While the actions do not need to have the precise same legal theories, they must be sufficiently similar, and seek "'the same or substantially the same relief'" (*id.*, quoting *Liebert v TIAA-CREF*, 34 AD3d 756, 757 [2d Dept 2006]). The mere fact that a plaintiff in an action being considered is a defendant in prior litigation need not result in defeat of the motion (*Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]). However, if the nature of the relief sought is not substantially the same, then the second action is not subject to dismissal (*id.*).

Here, while the two actions involve the same subject matter, the Lease, the Other Action, which had been commenced by defendant, sought only an injunction enjoining plaintiff from opening the gym in violation of the CO and without a PACO, and plaintiff had not asserted any counterclaims. In this action, the nature of the relief sought is different – plaintiff is seeking money damages for fraud, and declarations about the parties' obligations under the Lease. Thus, dismissal on the ground of another action pending would not be appropriate.

Dismissal for failure to state a claim and on documentary evidence, however, is granted. First, the claim for fraudulent inducement fails to state a claim. To state a claim for fraud, the plaintiff must allege a misrepresentation of a material fact, falsity, scienter, justifiable reliance, and damages (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). "Mere allegations that a party entered into a contract lacking the intent to perform are insufficient to establish a claim of misrepresentation or fraud" (*Lucker v Bayside Cemetery*, 114 AD3d 162, 175 [1st Dept 2013] [citation omitted]; *see Fariello v Checkmate Holdings, LLC*, 82 AD3d 437, 437 [1st Dept 2011]). Plaintiff, here, is alleging that defendant breached a written representation that was an explicit promise in the contract, not something that was collateral or extraneous to the

agreement (*Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept 2001] [general allegations in fraudulent inducement claim that defendant entered into agreement while lacking intent to perform is insufficient]; *see also Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). Plaintiff's claim is that, notwithstanding paragraph 50 (A) (iv), defendant did not intend to allow plaintiff to open prior to obtaining the CO (complaint, ¶¶ 5-8). Plaintiff even admits in its memorandum in opposition that its "first cause of action is based on representations made within the body of the Lease" (plaintiff's memorandum in opposition at 8). This fails to establish a claim for fraud and is dismissed.

The second claim also is dismissed. This claim seeks to bar defendant from interfering with plaintiff's right under the Lease to open the gym prior to the issuance of the CO or the PACO. Such an injunction would be contrary to the law, because it is unlawful to operate a gym without a PACO (*see* New York City Admin Code § 27-525.1 [a]), and in violation of the CO (*see* New York City Admin Code § 28-118.3.1). Plaintiff's argument that section 50 (A) (iv) of the Lease is enforceable because it only involves actions that are malum prohibitum, is unavailing. Contracts that are malum prohibitum "cannot form the basis of an action except where the statute violated is one designed to protect one set of men from another set of men more advantageously situated," and these Building Code provisions are not such statutes (*O'Connor v O'Connor*, 263 App Div 820, 821 [2d Dept 1941], *affd* 288 NY 579 [1942] [citations omitted]). Where the purpose of a statute or regulatory scheme is to protect the public health and safety, a court will not enforce an agreement which violates the statute or regulations (*see Richards Conditioning Corp. v Oleet*, 21 NY2d 895, 896 [1968]; *Gutfreund v DeMian*, 227 AD2d 234, 234-235 [1st Dept 1996] ["A party who contracts to violate a statute enacted for public

protection . . . may not sue for a breach thereof"] [citations omitted]). Here, the Building Code provisions were clearly enacted for the public's health and safety, and this court will not enforce paragraph 50 (A) (iv) to permit plaintiff to open and operate the gym without a CO or PACO. Plaintiff's reliance on *Glassman v ProHealth Ambulatory Surgery Ctr., Inc.* (14 NY3d 898, 900 [2010]), is misplaced. That case involved a fee splitting arrangement between the plaintiff and an ambulatory surgery center, which center was subject to certain New York Public Health Law provisions prohibiting sharing such fees. The court found that the plaintiff had failed to identify any overarching public policy that mandated voiding the contract (*id.*). Again, the Building Code provisions in the instant case mandate voiding paragraph 50 (A) (iv) with regard to opening the gym without the CO and PACO. In addition, the injunction sought in this claim would be contrary to this court's prior preliminary injunction order in the Other Action, enjoining plaintiff from opening the Premises in violation of the CO.

The third cause of action also is insufficient as a matter of law. In this claim, plaintiff alleges that the DOB issued the four violations, the default notice was sent by defendant, that an Event of Default could provide a basis to terminate the Lease, and that the cure period had been extended to February 7, 2014, but had expired. It seeks a declaration as to whether the Lease can be terminated on the basis of these facts, and specifying what, if anything, plaintiff could do to avoid such termination (complaint, ¶¶ 42-54). This fails to state a viable claim for declaratory relief, because it fails to present a justiciable controversy. Defendant has not elected to serve the five-day notice of termination on plaintiff as required by Article 20 (A) (i) to terminate the Lease. Plaintiff presents proof that while the gym has not opened and is idle, it has been paying rent of $31,666.67 every month since April 2014, as required by the Lease, and defendant has been

accepting such rent (*see* affidavit of James Somoza, dated September 3, 2014, ¶ 5). Based on these facts, there is no justiciable controversy. It is not the court's role to give litigants legal advice as to what to do to avoid breaching a contract. The claim is dismissed.

Finally, the fourth cause of action is dismissed. In that claim, plaintiff seeks a declaration that the notice of default defendant sent to plaintiff was defective (complaint, ¶¶ 55-69; exhibit K to notice of motion). To determine if such a notice is sufficient, the court must consider if it was reasonable in view of the attendant circumstances (*see Hughes v Lennox Hill Hosp.*, 226 AD2d 4, 17-18 [1st Dept 1996]; *see also Oxford Towers Co., LLC v Leites*, 41 AD3d 144, 144-145 [1st Dept 2007]). The October 15, 2013 default notice was sent in accordance with the notice provision in the Lease, Article 44 (exhibit H to notice of motion, Lease at 60). It was received and not objected to by plaintiff, and plaintiff fails to allege any detriment or prejudice from any alleged defect (*Rower v West Chamson Corp.*, 210 AD2d 7 [1st Dept 1994]. Therefore, the notice was legally effective (*see New York City Indus. Dev. Agency v Web Holdings LLC*, 2013 WL 126394, * 4 [Sup Ct, NY County Jan 8, 2013]). Plaintiff's allegation in the complaint that the notice was defective because it failed to advise plaintiff that the Lease would be terminated if the DOB violations were not corrected, fails to provide a basis for relief. The Lease at Article 19 (E) provided that an "Event of Default" shall occur when the plaintiff shall fail to comply with or perform any term thereof, and such failure continues for more than 30 days after notice, or if the default could not be cured within the 30 days, when the plaintiff shall not commence with due diligence the curing of the default or fails or neglects to prosecute or complete with due diligence the curing of such default (exhibit H to notice of motion, Lease at 33). Article 20 (A) (i) of the Lease provided that if an Event of Default occurred, defendant, at

its option, may terminate the Lease by giving plaintiff five days notice (exhibit H, Lease at 34). Thus, the Lease simply required that the notice set forth the nature of the default and give plaintiff 30 days to cure, or commence with due diligence to cure the default. The notice at issue did satisfy these requirements and even specifically referred to Article 19 (E) of the Lease (exhibit K to notice of motion). Contrary to plaintiff's allegations, there is nothing in the Lease that requires that the notice state that the Lease will be terminated if plaintiff failed to comply. This notice was sufficient (*see 12 Broadway Realty, LLC v Levites*, 44 AD3d 372, 372 [1st Dept 2007] [notice referencing lease default provision, which provided that tenant may begin to cure within 10 days, was sufficient]). Therefore, the fourth claim fails as a matter of law.

The branch of defendant's motion for cancellation of the notice of pendency, however, is denied. Simply because the plaintiff's complaint failed to state a claim does not mean that plaintiff had not "commenced or prosecuted the action in good faith" within the meaning of CPLR 6514 (b). The court notes, though, that defendant would be entitled to cancellation if and when "the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519" (CPLR 6514 [a]; *see Jonestown Place Corp. v 153 W. 33rd St. Corp.*, 74 AD2d 525, 526 [1st Dept 1980], *affd* 53 NY2d 847 [1981]). Accordingly, it is

ORDERED that defendant's motion to dismiss is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of defendant's motion to cancel the notice of pendency is denied.

Dated: December 4, 2014

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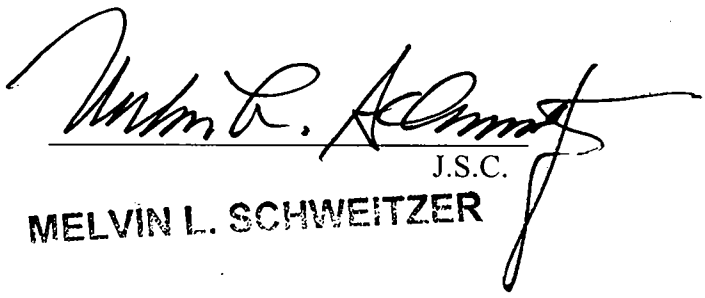

J.S.C.

MELVIN L. SCHWEITZER