TJS4 LLC v BSD 80 Broad LLC
2017 NY Slip Op 31375(U)
June 27, 2017
Supreme Court, New York County
Docket Number: 652016/16
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

----------X

TJS4 LLC d/b/a THE JUICE SHOP,

Plaintiff,

Index No.: 652016/16
DECISION/ORDER

-against-

BSD 80 BROAD LLC,

Defendant.

----------X

HON. ELLEN M. COIN, J.S.C.:

In this commercial landlord/tenant action, defendant-landlord BSD 80 Broad LLC (landlord) moves for summary judgment dismissing the complaint. For the following reasons, the motion is granted.

BACKGROUND

Landlord is the owner of a building (the building) located at 80 Broad Street in the County, City and State of New York. Affirmation of Brian S. Cohen, ex. A (complaint), ¶ 1. Plaintiff TJS4 LLC d/b/a The Juice Shop (TJS) is the tenant of a portion of the building's ground floor commercial space. Id. On October 22, 2015, landlord and TJS entered into a 13-year lease (the lease) for that commercial space. Id., ¶ 12; ex. C. The relevant portions of the lease provide as follows:

"9. Indemnity and Insurance

* * *

"9.03 Tenants' Insurance. Tenant covenants and agrees that from and after the Commencement Date, and during the Term of this Lease or any renewal thereof, Tenant will carry and maintain, at its sole cost and expense, the following types of insurance, naming both Tenant and Landlord as insureds, in the amounts specified and in the forms hereinafter provided with insurance companies

authorized to do business in New York State and rated A/X or better in the most current edition of Best's Insurance Report (or the then equivalent of such rating):

> "(a) Commercial General Liability Insurance. Tenant shall keep in full force and effect commercial general liability insurance, which shall include broad form property damage liability coverage, extended bodily injury coverage, . . . contractual liability coverage and independent contractors coverage, in amounts of not less than $1,000,000.00 per occurrence limit for bodily injury or property damage, $1,000,000.00 per occurrence for personal injury/$2,000,000.00 in the aggregate per location, and $2,000,000.00 for products and completed operations, and with umbrella liability coverage of not less than $5,000,000.00 per occurrence and aggregate per location, on an 'occurrence' form including, without limitation, endorsement CG2407 or its equivalent, and naming Landlord, its managing agent, if any, and each Superior Lessor and Superior Mortgagee whose name and address is furnished to Tenant as additional insureds.
>
> "(b) Intentionally deleted
>
> "(c) Alterations, Improvements and Betterments. Tenant shall at all times during the Term maintain in full force and effect a policy of all risk insurance including coverage for sprinkler damage, vandalism and malicious mischief, naming both Landlord and Tenant as insured parties as their interests may appear, covering all of Tenant's alterations, improvements and betterments to the Premises now existing or to be added, including, without limitation, Tenant's Property as defined in Article 12 . . . to the extent of their full replacement costs as updated from time to time during the Term. Tenant assigns its interests in the proceeds of such insurance to Landlord so that the proceeds shall be paid directly to Landlord.
>
> * * *
>
> "11. Alterations
>
> * * *
>
> "11.04 Tenant, at its expense, shall obtain . . . all necessary governmental permits and certificates for the performance of Alterations and for final approval thereof upon completion, and shall cause Alterations to be performed in compliance therewith, . . . Any Alterations in or to the mechanical, electrical, plumbing, sanitary, heating, air conditioning, ventilation, life safety or other

systems of the Building or to or affecting the roof or any other structural part of the Building, shall be performed only by contractor(s) reasonably approved by Landlord. . . . Throughout the performance of Alterations, Tenant, at its expense, shall carry, or cause to be carried, worker's compensation insurance in statutory limits, employer's liability insurance, disability benefits insurance, property insurance, builder's risk insurance and general liability insurance, with completed operation endorsement, for any occurrence in or about the Building, and covering construction subcontractors and materialmen to be employed by Tenant, under which Landlord and its agent . . . shall be named as parties insured, in such limits as Landlord may reasonably require, with insurers reasonably satisfactory to Landlord. Tenant shall furnish Landlord with reasonably satisfactory evidence that such insurance is in effect at or before the commencement of Alterations and, on request, at reasonable intervals thereafter during the continuance of Alterations.

* * *

"24. Events of Default; Conditions of Limitation

* * *

"24.04. Landlord shall not be in default of any of its obligations under this Lease unless and until (I) Landlord shall have received written notice from Tenant specifying such failure and (ii) Landlord shall fail to perform any of its obligations under this Lease specified in such written notice within thirty (30) days after receipt of such written notice; provided, however, that if any such default by Landlord cannot with due diligence be cured within a period of thirty (30) days, then Landlord shall have such additional time reasonably necessary to cure the default . . . .

* * *

"36. Definitions and Miscellaneous Provisions

* * *

"36.06 If Tenant shall request Landlord's consent and Landlord shall fail or refuse to give such consent, Tenant shall not be entitled to any damages for any withholding by Landlord of its consent, it being intended that Tenant's sole remedy shall be an action for specific performance or injunction, and subject to the provisions of 36.19 that such remedy shall be available only in those cases where Landlord has expressly agreed in writing not to unreasonably withhold its consent or where as a matter of law Landlord may not unreasonably withhold its

consent."

Id., ex. C.

TJS alleges that on March 1, 2016, while it was arranging to have "build out" alteration work performed in its leased space, landlord began demanding that TJS obtain an additional $5,000,000.00 umbrella policy to cover its general contractor and subcontractors, despite the fact that the lease does not require TJS to maintain such a policy. Cohen Aff., ex. A, complaint ¶ 26 at 7. TJS also alleges that landlord improperly rejected two of the general contractors that TJS had proposed to use on the alteration project on the ground that they did not maintain said coverage, and that landlord stated its position in writing in a letter dated March 15, 2016. Id., ex. A, Complaint ¶¶ 30-32 at 8. TJS next alleges that it requested landlord to modify its requirements. Id., ex A. Complaint ¶ 35 at 9. Finally, TJS alleges that landlord refused to do so, and concludes that landlord is in breach of the lease, because the period of time in which to cure a default that is specified in Article 24 of the lease has expired without the landlord taking any action. Id., ex. A, complaint ¶¶ 47, 48 at 11. For its part, landlord asserts that section 11.04 of the lease authorizes it to place conditions on its approval of any of TJS's proposed general contractors or subcontractors, including the condition that they obtain and maintain additional insurance. Affidavit of David Irsani ¶¶ 7-8; affidavit of Kristen Smith ¶¶ 5-6.

The complaint sets forth one cause of action for breach of contract. Cohen Aff., ex. A. Landlord's answer alleges affirmative defenses. Id., ex. B.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving by competent, admissible evidence that no material, triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). Further, it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran v Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995).

Here, as was previously mentioned, TJS's complaint sets forth one cause of action for breach of contract. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 (1st Dept 1988). TJS's breach of contract claim alleges, in pertinent part, as follows:

> "59. Landlord was in material breach of the lease as early as March 15, 2016, when it refused to allow Tenant to enter the Premises and commence work with contractors unless Tenant or its contractors obtained an additional $38,000.00 umbrella insurance policy and an additional automobile insurance policy, neither of which was required by the Lease.

* * *

> "65. Landlord's material breach of the Lease excuses Tenant from any further obligations under the Lease and entitles Tenant to damages comprised of the monies it spent in compliance with the Lease, plus the damages caused by Landlord's default and breach. These damages total at least $3.85 million."

Cohen Aff., ex. A, complaint ¶¶ 59, 65 at 15-16.

Landlord first argues that the complaint should be dismissed because the lease bars tenant's claims for money damages and rent relief. Landlord points to paragraph 36.06 of the lease, which provides:

> "If Tenant shall request Landlord's consent and Landlord shall fail or refuse to give such consent, Tenant shall not be entitled to any damages for any withholding by landlord of its consent, *it being intended that Tenant's sole remedy shall be an action for specific performance or injunction*, and subject to the provisions of 36.19 that such remedy shall be available in only those cases where landlord has expressly agreed in writing not to unreasonably withhold its consent or where as a matter of law landlord may not unreasonably withhold its consent."

Cohen Aff., ex. C at 42 (emphasis added). Landlord also notes that the prayer for relief in the complaint seeks money damages, not specific performance or other equitable relief. Finally, landlord correctly notes that governing appellate case law routinely upholds and enforces limitation of remedies clauses in commercial contracts. *See e.g. MEG Holdings, LLC v Sapphire Power Fin. LLC*, 126 AD3d 608, 609 (1st Dept 2015), citing *Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 77 (1st Dept 2013). Landlord concludes that this court should enforce the limitation of remedies clause, set forth in paragraph 36.06 of the lease, and dismiss the complaint because it requests impermissible relief.

TJS responds that article 11 of the lease, which governs tenant's alterations to the

building, refers to landlord's "approval" rather than to landlord's "consent." Plaintiff's memorandum of law at 7-12. TJS then asserts that the lease treats these two words as separate terms of art, and that the limitation or remedies clause in paragraph 36.06 applies only to those instances where landlord refuses to give its "consent" to certain of a tenant's proposed actions, but not to those instances where landlord refuses to give its "approval" to a tenant's proposed actions. Upon review of the lease, the court believes that this is merely a sophistic distinction and finds TJS's proposed reading of the lease to be untenable. Paragraphs 36.18 and 36.19 of the lease treat the terms "consent" and "approval" interchangeably. Further, the lease does not contain a paragraph governing landlord's "failures to consent" separate from that governing landlord's "failures to approve" (i.e., a coordinate to paragraph 36.06). These points undercut TJS's proposed interpretation of the lease. TJS fails to cite a single case in which its proposed interpretation was ever given effect.[1] Therefore, the court rejects TJS's argument, and finds that the relief sought in the complaint is indeed barred by the limitation of remedies clause set forth in paragraph 36.06 of the lease. Accordingly, the court finds that landlord is entitled to summary judgment dismissing the complaint.

In light of the foregoing, the court need not address landlord's argument that it did not breach the lease because it reasonably withheld approval of tenant's contractors based on insurance requirements that tenant itself accepted.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant BSD 80 Broad LLC is

---

[1] TJS's sole citation, *A2B LLC v Borges* (2013 WL 4470428 [Sup Ct, NY County 2013]), involved two contracts that were entitled "consents." It does not discuss a "consent vs approve"distinction, and offers no support for TJS's "term of art" argument.

granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk, and the Clerk is directed to enter judgment accordingly in favor of defendant.

Dated: New York, New York
June 27, 2017

ENTER:

Hon. Ellen M. Coin, A.J.S.C.