SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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AEROTEK, INC. and TEKSYSTEMS, INC.,

Plaintiffs,

-against-

Index No.
654294/2016

757 3rd AVENUE ASSOCIATES, LLC and MEPT 757 THIRD AVENUE, LLC,

DECISION AND ORDER

Defendants.

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HON. SALIANN SCARPULLA, J.:

Defendants 757 3rd Avenue Associates, LLC ("757") and MEPT 757 Third Avenue, LLC ("MEPT") (together "Defendants") move for an order, pursuant to CPLR 3211 (a) (1), (7) and (10), dismissing the complaint of plaintiffs Aerotek, Inc. and TEKSystems, Inc. (together "Plaintiffs") for failure to state a claim, and based on documentary evidence.

Plaintiffs sue both the former and the current landlord/owner of the building in which they lease commercial space for failing to reimburse them for improvements they made to the premises as required under their leases. Defendants challenge the complaint on the grounds that MEPT, as the current owner, never assumed the obligation to pay tenant improvement costs that were incurred prior to the closing of its purchase of the building. Both defendants argue that Plaintiffs signed tenant estoppel certificates in

which they stated that the landlord was not in material default of the leases, and that Plaintiffs were not entitled to any further tenant improvement allowances from defendants.

On May 7, 2013, defendant 757, as landlord of a building located at 757 Third Avenue, New York, New York ("the Building"), executed a lease with plaintiff TEKSystems, Inc., as tenant for a portion of the 12th floor, and into an identical lease with Aerotek, Inc., as tenant for a portion of the 8th floor of the Building (collectively, "the Leases").

Pursuant to Section 6.5 (A) of the Leases, 757 was required to reimburse the Plaintiffs for improvements they made to their premises through a "Tenant Improvement Allowance." Section 6.5 (B) specified a particular time frame during which Plaintiffs were required to request reimbursement for these improvement allowances:18 months from the commencement date of the Leases, which was July 1, 2013. The Leases further provided that 757 was required to pay the properly submitted claims within 30 days after the plaintiffs' request. The Tenant Improvement Allowance was capped at $1,014,518.80 for TEKSystems, Inc., and $909,543.12 for Aerotek, Inc.

Plaintiffs assert that the tenant improvement work performed by them was monitored by 757, and completed on December 31, 2013. The total cost of tenant improvements paid by TEKsystems was $1,039,496.00, and by Aerotek was $931,860.00. In August 2014, Plaintiffs sent, and defendant 757 received, various materials supporting Plaintiffs' requests for reimbursement under the Tenant

Improvement Allowance. The materials included invoices, already paid by Plaintiffs, reflecting materials and labor to construct the improvements. 757 responded that it needed additional information. On December 4, 2014, Plaintiffs sent an updated request which included final lien releases from material suppliers and laborers. In April 2015, Plaintiffs again sent reimbursement materials and information to 757, asking if it needed any additional information to process the Tenant Improvement Allowances.

On February 6, 2015, 757 executed a purchase and sale agreement with MEPT ("PSA") pursuant to which MEPT agreed to purchase the Building from 757. Under Article 10 of the PSA, 757 assigned to MEPT its duties and obligations contained in the Leases accruing on or after the Closing Date. Article 7 (h) (ii) of the PSA provided that 757 was responsible for tenant improvement costs incurred prior to the closing date, and that MEPT would receive a credit against the purchase price in the amount of such costs if and to the extent that the costs were not paid by 757. This credit was set forth in attached Schedule K-1, which listed as "unfunded tenant inducement costs," TEKsystems and Aerotek's contractually capped tenant improvement costs of $1,014,518.80 and $909,543.12, respectively.

On February 11, 2015, 757 and MEPT executed a third amendment to the PSA ("Third Amendment to PSA"), which provided in Section 3 that 757 believed that Aerotek, TEKsystems, and another tenant had "either (x) failed to timely exercise their right or (y) are otherwise no longer entitled to receive the tenant improvement allowances described on Schedule A attached hereto (the "Expired TI Allowances") in accordance

with the terms of their leases," and that 757 would indemnify MEPT for any liabilities and costs it incurred arising from 757's failure to pay the Expired TI Allowances. The Third Amendment to the PSA also amended Schedule K-1 to reflect these changes by omitting Aerotek and TEKSystems from the list of unfunded tenant inducement costs.

On April 3, 2015, Plaintiffs delivered tenant estoppel certificates addressed to 757, which indicated that the statements were made with knowledge that "you and the successor owner of the Property and the present and future lender . . . may rely on them" ("Tenant Estoppel Certificates"). Plaintiffs certified in paragraph 8 of the Tenant Estoppel Certificates that:

> "All improvements required by the terms of the Lease to be made by Landlord in order for the term to commence have been completed in accordance with the Lease except as follows: None. Tenant has no further rights to receive any allowances or Landlord contributions for tenant improvements pursuant to the terms and conditions of the Lease"

The plaintiffs further certified that "neither Tenant nor Landlord is in material default in the performance of any covenant, agreement or condition contained in the lease," and that to plaintiffs' knowledge, they had no setoff or counterclaim against Landlord against the payment of rent or other charges under the leases.

On April 22, 2015, the purchase closing took place. 757 notified Plaintiffs that 757's interest was assigned to MEPT, and that MEPT "assumed the obligations as landlord under [the] lease which accrue from and after the date hereof." On August 15, 2016, Plaintiffs commenced this action for breach of the leases against defendants RFR

Realty, LLC ("RFR") and MEPT seeking repayment of the tenant improvement allowances owed to them under the Leases. By stipulation dated December 23, 2016, Plaintiffs discontinued the action against RFR, and the parties agreed to consolidate this action with one commenced by plaintiffs against 757 as the original landlord under the Leases.

Defendants move to dismiss on several grounds. First, MEPT argues that it never assumed any obligation to pay the tenant improvement allowances to plaintiffs when it purchased the building under the PSA as amended. Second, Defendants argue that Plaintiffs waived their right to seek the tenant improvement allowances based on Plaintiffs' certifications in the Tenant Estoppel Certificates. Finally, they contend that MEPT did not have knowledge of any unique, contrary information to what was set forth in the estoppel certificates.

In opposition, Plaintiffs contend that because MEPT received $2 million in credits towards the purchase price of the property, which sum was expressly set aside to cover Plaintiffs' tenant improvement allowances, it is responsible for reimbursing Plaintiffs for those allowances. Plaintiffs argue that the Tenant Estoppel Certificates do not bar their claims, because the certificates refer to future claims as opposed to Plaintiffs' known or existing claims. They contend that this language carved existing claims for reimbursement out of the tenant improvement allowances from those documents. Alternatively, Plaintiffs urge that because MEPT knew of a contrary, and true, state of facts, it cannot rely on the estoppel certificates.

Discussion

Under the PSA, 757 assigned to MEPT all of its right, title, and interest in the property, with MEPT only agreeing to assume 757's obligations "accruing on or after the Closing Date under . . . (i) the leases." As the assignee, MEPT was not promising to assume the performance of all of 757's duties.

"The mere assignment of a contract may not be interpreted as a promise by the assignee to the assignor to assume the performance of the assignor's duties to create new liability on the part of the assignee to the assignor for the performance of those duties. Similarly, the assignment does not create a new liability on the part of the assignee to the other party to the contract assigned." *Hudson Eng'g Assoc., P.C. v. Ames Dev. Corp.*, 228 A.D.2d 477, 477-478 (2d Dept. 1996); *Kagan v. K-Tel Entertainment*, 172 A.D.2d 375, 377 (1st Dept. 1991). Without an affirmative assumption, MEPT, as assignee, is not liable on any agreements by which 757 may have bound itself. *Hudson Eng'g Assoc., P.C. v. Ames Dev. Corp.*, 228 A.D.2d at 477; *Kagan v. K-Tel Entertainment*, 172 A.D.2d at 377.

The PSA specifically provided that 757, not MEPT, "shall be responsible for Tenant Inducement Costs payable in connection with the initial term of the Leases entered into prior to the date hereof." "Tenant Inducement Costs" are defined to include tenant improvement costs. The Third Amendment to the PSA plainly addressed Aerotek's and TEKsystems' tenant improvement allowances, and provided that 757 believed that these tenant improvement allowances were expired, and that 757 would indemnify and

hold MEPT harmless for any losses and costs incurred by MEPT arising from 757's failure to pay these tenant improvement allowances. Schedule A to that amendment listed plaintiffs' improvement allowances as Expired TI Allowances.

Taken together, these provisions unambiguously provide that MEPT did not assume the obligation for Plaintiffs' tenant improvement allowances incurred prior to the closing. Plaintiffs' reliance on language in the original PSA, under which MEPT was to be given a credit off the purchase price for tenant improvement allowances, is misplaced. That language was superseded by the Third Amendment to the PSA in which 757 agreed to indemnify MEPT for all losses, costs, and damages for Plaintiffs' improvement allowances, which it believed were expired. There is simply no basis to find that MEPT assumed liability to plaintiffs for the allowances.

Moreover, in the Tenant Estoppel Certificates, Plaintiffs certified to MEPT, with knowledge that MEPT would rely on their statements, that all improvements 757 was required to make under the Leases had been completed, and that Plaintiffs had "no further rights to receive any allowances of Landlord contributions for tenant improvements pursuant to the terms and conditions of the Lease[s]." Plaintiffs also confirmed in the third paragraph of the Tenant Estoppel Certificates that 757 was not in material default in the performance of any lease agreement or condition.

Tenant estoppel certificates should be enforced unless the party "can show a defense to the making of the document, such as fraud or duress, or that the assignee accepted the certificate with knowledge of the contrary, and true, state of the facts." *JRK*

Franklin, LLC v. 164 E. 87th St. LLC, 27 A.D.3d 392, 393 (1st Dept. 2006), citing *Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d 580, 586-587 (1981); *see also Capstone Bus. Funding, LLC v. Optimum Constr., Inc.*, 134 A.D.3d 471, 471 (1st Dept. 2015). Here, while Plaintiffs assert that they did not intend to represent in the Tenant Estoppel Certificates that they were not owed funds from 757 for tenant improvements, they fail to allege fraud or duress in making the certificates. Plaintiffs' argument that the word "further" meant only future improvement allowances, and that they did not include the allowances they were still seeking to recover from 757, puts a strained reading on an unequivocal statement that no allowances were owed. In addition, that unequivocal statement was supported by plaintiffs' additional assurance that 757 was not in material default of any agreement or covenant in the Leases.

While Plaintiffs argue that MEPT knew of information that was contrary to what was set forth in the Tenant Estoppel Certificates, it was Plaintiffs' obligation, as between Plaintiffs and MEPT, to ensure that they represented to MEPT the true state of facts. Moreover, the language in the Third Amendment to the PSA, providing that the allowances were expired, negates Plaintiffs' allegations that MEPT knew that tenant improvement costs were still owed to Plaintiffs. Accordingly, Plaintiffs' claims against MEPT are dismissed.

Plaintiffs' claims against 757, however, stand on a different ground. The Tenant Estoppel Certificates were executed in favor of 757. The Tenant Estoppel Certificates were executed in favor of MEPT and any present and future lenders, and may not be used

to estop Plaintiffs as tenants from asserting their rights as against 757 as the landlord. *See Padell Nadell Fine Weinberger & Co. v. Midtown Realty Co.*, 245 A.D.2d 188, 189 (1st Dept. 1997) (tenant estoppel certificates may not be used to estop tenants from asserting right as against landlord); *see also Hammelburger v. Foursome Inn Corp.*, 54 N.Y.2d at 588; *1689 First Ave., Inc. v. Zhifeng Zheng*, 25 Misc.3d 24 (App Term, 1st Dept. 2009).

Further, Plaintiffs have raised an issue of fact as to whether 757 accepted their Tenant Estoppel Certificates with knowledge of the contrary, and true, state of facts; that is, that plaintiffs still were seeking improvement costs from it. *See Peach Parking Corp. v. 346 W. 40th St., LLC*, 44 A.D.3d 417, 418 [1st Dept. 2007]; *JRK Franklin, LLC v. 164 E. 87th St. LLC*, 27 A.D.3d at 393; *Padell Nadell Fine Weinberger & Co. v. Midtown Realty Co.*, 245 A.D.2d at 188 (estoppel certificates executed in favor of lender cannot be used to prevent tenant from asserting rights against landlord); *NHS Natl. Health Servs. v. Kaufman,* 250 A.D.2d 528, 529 (1st Dept. 1998) (where tenant executed estoppel certificate stating that lease was not amended even though it had been amended, landlord, who was aware of amendment, could not use estoppel certificate to bar tenant recovery under amended lease). Plaintiffs have sufficiently presented a defense to 757's attempt to enforce the Tenant Estoppel Certificates against them, and their claims for breach of the Leases are not dismissed as against 757.

In accordance with the foregoing, it is hereby

ORDERED that motion of defendant MEPT 757 Third Avenue, LLC to dismiss the complaint as against it is granted and the complaint is dismissed in its entirety as against defendant MEPT 757 Third Avenue, LLC; and it is further

ORDERED that the motion of defendant 757 3rd Avenue Associates, LLC to dismiss is denied, and the action is severed and continued as against this defendant.

This constitutes the decision and order of the court.

Dated: October 12, 2017

ENTER:

HON. SALIANN SCARPULLA J.S.C.