

Community Resources & Servs. for Children, Inc. v NRP LLC II
2017 NY Slip Op 32520(U)
November 21, 2017
Supreme Court, New York County
Docket Number: 650993/2017
Judge: David B. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

-----X
COMMUNITY RESOURCES AND SERVICES FOR CHILDREN,
INC.,

INDEX NO. 650993/2017

Plaintiff,

MOTION DATE 4/24/2017

- v -

MOTION SEQ. NO. 001

NRP LLC II, HAMILTON PARK ASSETS LLC

DECISION AND ORDER

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 44, 45, 46, 47, 48, 49

were read on this application to/for DISMISSAL

Upon the foregoing documents, it is

Defendant Hamilton Park’s motion to dismiss is granted. The cross-motion brought by defendant NRP is also granted and the matter is dismissed. The Complaint alleges that plaintiff and NRP entered into a five-year lease in 2008. That the lease expired pursuant to its terms in 2014 and plaintiff had a month-to-month tenancy. That in April 2016, after learning that pursuant to the Certificate of Occupancy that the leased premise was supposed to remain vacant, plaintiff ended the tenancy and vacated the leased premise. However, plaintiff has still been billed for several months rent following April 2016. The Complaint seeks a declaratory judgment that due to the impossibility of performance under the lease by landlord, the lease was terminated on April 1, 2016 and it does not owe any rent for any months after April 2016; a preliminary injunction

prohibiting defendant Hamilton from seeking to enforce its right to collect the rent; and damages from each defendant for breach of contract and for breach of the implied warranty of good faith and fair dealing;¹ and for legal fees in connection with this action.

Plaintiff's first cause of action seeks a declaration that the lease ended on April 1, 2016 after learning that pursuant to the Certificate of Occupancy that the leased premise was supposed to remain vacant and seeks a declaration that it owes no rent. In Section 40(a), the lease defines the Permitted Use of the property "solely for a day center for mentally retarded, developmentally disabled persons over the age of eighteen." In Section 41(b), plaintiff agreed "that tenant shall, throughout the Term of this Lease, apply for, secure, maintain and comply with all municipal or government approvals, consents, licenses or permits which may be required for the conduct by Tenant of the Permitted Use and pay, if, as and when due, all license and permit fees and charges of a similar nature in connection therewith and provide Landlord with copies thereof upon request." Similarly, the lease provided in Section 44 that plaintiff would obtain any licenses and permits and its own expense to conduct plaintiff's business in the location. The lease also contained many alteration provisions that plaintiff was to perform that all required actions by plaintiff, including filing with the appropriate governmental agencies. In other words, by the plain language of the lease, it was up to tenant to ensure that municipal or governmental requirements were met. Applied to the instant cause of action, the Complaint seeks a declaration that the lease was terminated as of the time plaintiff learned of the alleged unlawful use of the property and that it was entitled to cancel the lease at that time and stop paying rent. However, that is contradicted by the plain language of the lease. Therefore, the first cause of action is dismissed.

¹ Plaintiff has withdrawn its cause of action for breach of warranty as to defendant NRP.

The motions seeking dismissal of the request for a preliminary injunction is granted. Plaintiff's argued that this cause of action was pled to prevent defendant Hamilton from collecting rent. As the collection of rent is not an irreparable injury, plaintiff cannot maintain this cause of action. Further, plaintiff has not demonstrated a likelihood of success on the merits of its complaint. In a commercial lease context, a tenant's alleged inability to use the leased premises for its intended use due to the Certificate of Occupancy does not relieve tenant's obligation to pay rent for the period of time during which the premises were occupied (*Casilia v Webster LLC*, 140 AD3d 530 [1st Dept 2016]; *Silver v Moe's Pizza, Inc.*, 121 AD2d 376, 378 [2d Dept 1986]). Further, "a commercial lease is not void for illegality merely because the premises is not covered by a certificate of occupancy. The lease will be considered a valid contract if the bar to legal use of the premises is readily correctible and the language used in the lease indicates that the parties intended that the defect be corrected and the premises legally occupied" (*Kosher Konvenience, Inc. v Ferguson Realty Corp.*, 171 AD2d 650 [2d Dept 1991]). This case is unlike a case where a landlord made specific representation that the intended use would comply with the certificate of occupancy or there was a statement that fraudulently induced a tenant to execute the lease (*see Phillips & Huyler Assoc. v Flynn*, 225 AD2d 475 [1st Dept 1996]), here, there is no allegation that such statement was made, and in any case, plaintiff's allegation of active concealment is undone by the plain language of the lease. For these reasons, plaintiff's cause of action seeking a preliminary injunction enjoining Hamilton from seeking rent is dismissed.

The basis of plaintiff's breach of contract action is that defendants breached the lease in that defendants failed to provide a space to plaintiff which could be legally used and occupied, which plaintiff could have quietly enjoyed. This cause of action is dismissed as plaintiff took

possession of the premise and used the premise for the duration of the lease without any issues. Plaintiff received the benefit of its bargain for the entirety of its lease and based upon the allegations of the Complaint, defendants fully performed its obligations to plaintiff during the pendency of the lease. To the extent that the Certificate of Occupancy did not permit plaintiff's intended use, when discovered, plaintiff was a month-to-month tenant and had already received the full benefit of its initial lease. Any funds expended at the beginning of the lease had already received this benefit and were expended beyond the statute of limitations for a breach of contract. Further, a breach of contract action must be dismissed when the lease does not require a landlord to obtain a certificate of occupancy that would permit plaintiff's intended use of the premises (*Rivera v JRJ Land Prop. Corp.*, 27 AD3d 361 [1st Dept 2006]). For these reasons, the breach of contract cause of action is dismissed. In any event, plaintiff took the leased premise in "as is" condition and cannot complain now if it had not done its diligence in 2008. Similarly, as detailed above, the plain language of the lease contradicts this assertion. It was plaintiff's duty to ensure that the Permitted Use of the facility complied with local rules and laws. For similar reasons, the remaining cause of action for breach of the implied warranty is dismissed as is the cause of action for legal fees.

Accordingly, it is therefore

ORDERED, that the motion and cross-motion to dismiss this matter are granted and this action is dismissed.

This constitutes the decision and order of the Court.

11/21/2017

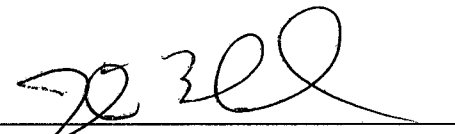
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	DO NOT POST		

APPLICATION:

CHECK IF APPROPRIATE:



DAVID BENJAMIN COHEN, J.S.C.

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

HON. DAVID B. COHEN
J.S.C.