SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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NEW YORK CITY TRANSIT AUTHORITY,

Plaintiff,

-against-

4761 BROADWAY ASSOCIATES, LLC,

Defendant.

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Index No. 452721/2014
Motion Seq: 002

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion for summary judgment by plaintiff New York City Transit Authority ("NYCTA") is denied.

Background

This action arises out of a dispute concerning maintenance and upkeep responsibilities for the Dyckman Street subway station (served by the A train). In 1926, the City of New York entered into an agreement with the property owner of the premises located at 4761-79 Broadway in which both parties agreed to have entrances to this subway stop located within the building rather than on the sidewalk.

This agreement, which was recorded, required the owner to build two entrances and two stairways (referred to as the "Approach" in the agreement) with the City's approval. The agreement also provided that "The Owner at its own cost and expense, shall maintain the Approach, after the same shall have been put in operation, and shall keep the same open at all hours of the day and night, Sundays and holidays included for the use of passengers . . . and shall keep all parts of the Approach at all times free from obstructions and in thorough order and repair and in a thoroughly clean, dry, safe and suitable condition for the use of such passengers"

(NYSCEF Doc. No. 68, Article 5). The agreement further provided that "All grants, covenants and agreements herein made by the Owner shall bind and enure to the benefit of the its representatives, successors and assigns . . . and shall be real covenants running with the land" (*id.* at Article 15).

The current owner, defendant 4761 Broadway Associates, LLC ("4761"), acquired the premises in 1991. NYCTA claims that 4761 has failed to clean, maintain or repair the Approach since it acquired the subject property. NYCTA contends that in several personal injury cases involving the subway station's staircases, 4761 has asserted that it never had control of the Approach. In 2006, NYCTA contends that it was compelled to close one of the two staircases because it was unsafe and, after complaints, NYCTA made repairs to this staircase after 4761 refused to do so.

NYCTA also insists that it was compelled to close one side of the other staircase in 2012 because it was unsafe and that 4761 refused to fix it despite demands from NYCTA and the Metropolitan Transit Authority ("MTA"). In March 2014, NYCTA decided that it needed to make repairs on the two staircases and charged 4761 for the work (which totaled $288,971.78). 4761 refused to pay.

NYCTA moves for summary judgment on its cause of action for breach of the covenant to clean, maintain and repair and also seeks a declaration that 4761 is obligated to abide by the covenant going forward.

4761 argues that this motion is premature because there has been no discovery and that NYCTA has the exclusive possession of the documents necessary for 4761 to oppose this action. 4761 argues that in prior litigation between the parties concerning the same issue, the First

Department held that summary judgment regarding the covenant was not appropriate because there was a factual issue regarding abandonment of the covenant. 4761 claims that the doctrine of collateral estoppel applies and prevents this Court from granting NYCTA's motion. 4761 argues that there are issues of fact regarding whether NYCTA abandoned or waived enforcement of the covenant. 4761 also observes that NYCTA's motion is actually for partial summary judgment since NYCTA has not moved to dismiss 4761's affirmative defenses.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec,*

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"Regardless of the intention of the parties, a covenant will run with the land and will be enforceable against a subsequent purchaser of the land at the suit of one who claims the benefit of the covenant, only if the covenant complies with certain legal requirements. These requirements rest upon ancient rules and precedents. The age-old essentials of a real covenant, aside from the form of the covenant, may be summarily formulated as follows: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one 'touching' or 'concerning' the land with which it runs; (3) it must appear that there is 'privity of estate' between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant" (*Neponsit Prop. Owners' Assoc. v Emigrant Indus. Sav. Bank*, 278 NY 248, 254-55, 15 NE2d 793 [1938]).

Here, the Court finds that the covenant runs with the land. The parties intended this result– the 1926 agreement specifically stated that its covenants would run with the land and that successors would be bound by the contents (*see* (NYSCEF Doc. No. 68, Article 15). Maintaining, repairing and cleaning the Approach obviously touches and concerns the land because the subway entrance is directly below 4761's building. And there is no dispute that there is privity of estate between the promisee and the promisor– NYCTA is the successor to the City of New York (and the Board of Transportation) and 4761 is the current owner of the premises.

Therefore, the key question for this Court is whether abandonment or waiver can be raised as a defense to a purported breach of a recorded covenant that runs with the land.

4761 relies upon a First Department decision, *Windley v City of New York* (104 AD3d 597, 961 NYS2d 441 [1st Dept 2013]), for the proposition that abandonment or waiver applies in this action because *Windley* involved the same parties, NYCTA and 4761, and contained analysis of the same 1926 agreement. In *Windley*, a personal injury case involving a plaintiff who was injured on a staircase at the Dyckman Street subway station, 4761 moved for summary judgment dismissing NYCTA's claim for contractual indemnification pursuant to the 1926 agreement (*id.* at 598). The Appellate Division upheld the Supreme Court's denial of 4761's motion (*id.*). The First Department stressed that "Pursuant to the [1926] agreement, 4761 Broadway may have a contractual duty to indemnify the Transit Authority for liability arising from plaintiff's fall on the stairway. This issue was never litigated or decided in the prior action and therefore it is not subject to collateral estoppel. . . . [A] question of fact exists as to whether the Transit Authority abandoned the agreement. Indeed, the maintenance records and cleaning schedule that 4761 Broadway submitted in support of its motion do not evince the Transit Authority's clear and unequivocal repudiation or abandonment of the agreement. Moreover, the issue of abandonment is intrinsically factual" (*id.*).

Obviously, the *Windley* decision arose in a different procedural posture from the instant motion– there, 4761 moved for summary judgment on the ground that it was not bound by the 1926 agreement and, here, NYCTA is claiming that 4761 *is* required to abide by the covenants in the agreement.[1] Despite this distinction, *Windley* involved the same parties and the same 1926 agreement. And although the First Department did not explicitly find that abandonment or waiver is applicable when considering an alleged breach of a covenant, the opinion clearly

[1]Apparently, this issue was never fully resolved in the *Windley* case because it settled.

referenced abandonment as an issue to be resolved in the instant dispute over the maintenance, repair and clean up of the Approach. Therefore, because the *Windley* decision accepted abandonment as a valid argument (instead of ruling that abandonment was not applicable to a recorded covenant that runs with the land), this Court must deny NYCTA's motion.

NYCTA's claim that abandonment, as referenced in contract law, does not apply to covenants that run with the land fails to sufficiently distinguish the First Department's decision in *Windley* that NYCTA may have abandoned the 1926 covenant (*see id.* at 599 citing *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 817 NYS2d 606 [2006]). This Court is unable to ignore the First Department's ruling on this issue.

Because abandonment is applicable in this case, the Court finds that NYCTA's summary judgment motion is premature. There must be discovery to explore how the parties have handled the maintenance, repair and clean up of the Approach. For instance, although NYCTA claims that 4761 failed to make repairs when requested in 2006, that does not establish whether the covenant was abandoned prior to 2006.

Accordingly, it is hereby

ORDERED that NYCTA's motion for summary judgment is denied.

The parties are directed to appear for a preliminary conference on February 1, 2018 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: December 21, 2017
New York, New York

ARLENE P. BLUTH, JSC