Swift v AK Props. Group, LLC
2018 NY Slip Op 30565(U)
March 29, 2018
Supreme Court, New York County
Docket Number: 161965/2014
Judge: Kelly A. O'Neill Levy

KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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JULIE K. SWIFT,

Plaintiff,

- against -

AK PROPERTIES GROUP, LLC

Defendant.

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DECISION AND ORDER

Index No. 161965/2014
Mot. Seq. 005 & 006

KELLY O'NEILL LEVY, J.:

Motion sequence numbers 005 and 006 are hereby consolidated for disposition.

This is an action arising from an alleged breach of a lease related to a commercial landlord-tenant dispute.

Defendant AK Properties Group, LLC moves, pursuant to CPLR § 3212, for summary judgment in its favor, dismissing plaintiff Julie K. Swift's complaint and granting defendant summary judgment on its counterclaims, and requests the issuance of a Writ of Assistance. Plaintiff opposes.

Plaintiff moves, pursuant to 22 NYCRR § 202.21(e), to vacate the Note of Issue and Certificate of Readiness, or in the alternative, for an Order authorizing plaintiff to take the deposition of Joseph Karten, the manager of AK Properties Group, LLC. Defendant opposes.

BACKGROUND

On August 13, 2013, plaintiff entered a 5-year lease with defendant, with an option to renew, for a dance studio located at 418 East 75th Street, 3rd Fl. (2nd Fl. Mezz.) in Manhattan [Lease (ex. 3 to the Mizrahi aff.)]. The studio is located within a wood-framed carriage house

and had required a significant amount of work to operate as a dance studio (Swift aff. at ¶ 8). Plaintiff originally purchased a Rosco dance floor, installed by Richard Wood from Wooden Kiwi Productions, LLC (*id.* at ¶ 8-9).

In or about January 2014, Joseph Karten, the manager of defendant's property, contacted plaintiff regarding the noise coming from the dance studio and asked her to sound-proof the floor (*id.* at ¶ 11). On January 15, 2014, plaintiff contacted Richard Wood, a construction supervisor, and asked for his assistance in sound-proofing the floor; Wood introduced plaintiff to Dave Foley, a production manager and technical director, to assist her (*id.* at ¶ 14). On April 1, 2014, plaintiff got a proposal from Foley and sent it to Karten (*id.* at ¶ 15). On May 14, 2014, plaintiff received an email from Foley telling her that after he met with defendant, he had concerns about the project, specifically regarding the landlord's request that all the noise be removed (*id.* at ¶ 16; Foley E-mail [ex. C to the Grinblat aff.]). Foley did not complete the project. On May 15, 2014, plaintiff contacted Wood, who was booked for the summer but offered to work on her floor in September (Swift aff. at ¶ 17; Wood Emails [ex. D to the Grinblat aff.]). On June 9, 2014, defendant sent plaintiff a Notice of Default (Swift aff. at ¶ 21).

In June 2014, defendant sent plaintiff a quote dated June 10, 2014 from a contractor, City Sites Interior, Inc. (hereinafter, City Sites). The quote was too expensive for plaintiff and City Sites had acknowledged that even if it fixed the floor in accordance with the proposal, noise might still penetrate the floor (*id.* at ¶ 18; City Sites Proposal [ex. E to the Grinblat aff.]). After receiving the proposal, plaintiff met with Karten and asked for a guarantee that she would not receive any more notices of default if she sound-proofed the floor with the services of City Sites (Swift aff. at ¶ 19). Karten responded, "There are no guarantees in life" (*id.*). On June 26, 2014, defendant sent plaintiff a Notice of Termination based on the Notice of Default (*id.* at ¶ 22).

Plaintiff then retained an attorney (*id.* at ¶ 23). In or about October 2014, plaintiff again contacted Wood for a quote to sound-proof the studio (*id.* at ¶ 24; Wood Email [ex. F to the Grinblat aff.]). In December 2014, defendant sent plaintiff another Notice of Default (Swift aff. at ¶ 25).

In the fall of 2014, a new tenant, Donath Communications, Inc. (hereinafter, Donath Communications), had moved into the space directly below plaintiff's dance studio (*id.* at ¶ 26). Beginning in December 2014, defendant began receiving complaints from Donath Communications regarding the level of noise coming from plaintiff's dance studio (Mizrahi Aff. at ¶ 31). Ellen Donath, President of Donath Communications, (hereinafter, Donath) asserts that the noise issue permeates her space on an ongoing basis and is a constant interruption to her business (Donath Aff. at ¶ 4). Donath contends that the noise issue continues to be so bad that she cannot schedule any meetings at her office, as plaintiff holds her classes throughout the day (*id.* at ¶ 5). Also, Donath asserts that the noise and vibration have caused cracks in her ceiling and that a one-track lighting fixture had fallen and broken (*id.* at ¶ 6). Furthermore, Donath cites the disruptive noise in the hallway, the music emanating from the open door of plaintiff's studio, candy wrappers and other debris left in the hallway and on the stairs, and the obstruction of the hallway by plaintiff's students who sit in the hallway to change clothes and by strollers that are left in the hallway (*id.* at ¶ 7-8).

Plaintiff asserts that, in or about January 2015, she completely reorganized her class schedule, eliminating all her early morning and afternoon classes, and only held classes after 3:30 PM to minimize the alleged disruption to Donath Communications (Swift aff. at ¶ 27). Donath argues that this is not true, and that there were classes throughout the day and at random times (Donath Aff. at ¶ 10).

Plaintiff argues that she has never been able to confirm the noise issue, as defendant has refused to test the noise levels from the office of Donath Communications (Swift Aff. at ¶ 28). Donath asserts that this is not true, as she personally told plaintiff on many occasions that there was a noise issue (Donath Aff. at ¶ 11).

On July 29, 2016, plaintiff sent defendant a notice to renew her lease (Swift Aff. at ¶ 29). On August 1, 2016, defendant rejected the renewal, stating that plaintiff was in default as evidenced by the ongoing court proceedings (*id.*).

In August 2016, plaintiff contacted Wood and had his company install acoustic materials, including carpet padding and other sound barrier materials, on August 19 and 20, 2016 (*id.* at ¶ 31). Plaintiff asserts that since early 2015, and at the very least, since she installed the additional sound-proofing material, there have been no further noise complaints that she is aware of (*id.* at ¶ 32). Donath disagrees with this assertion (Donath Aff. at ¶ 12).

The instant action was brought by plaintiff initially for a Yellowstone injunction to stay a landlord-tenant proceeding pursuant to a Notice of Default dated November 11, 2014 (Mizrahi Aff. at ¶ 4), which this Court granted on December 4, 2014. On December 3, 2014, plaintiff filed a Summons and Complaint [Summons and Complaint (ex. 1 to the Mizrahi aff.)]. On February 11, 2015, defendant filed an Answer with Counterclaims, after which on February 24, 2015, plaintiff filed a Reply [Answer with Counterclaims and Reply (ex. 2 to the Mizrahi aff.)]. Defendant asserts that plaintiff owes it money stemming from unpaid rent, late fees, taxes, etc. (Mizrahi Aff. at ¶ 8). Defendant counterclaims due to plaintiff's breach of the lease, specifically plaintiff's failure to properly install a dance floor which has caused noise and vibration, has disturbed other tenants, and has affected defendant's ability to properly manage and maintain the building (*id.* at ¶ 10). Defendant seeks a Writ of Assistance to enable it to remove plaintiff from

the premises once the lease term expires (*id.* at ¶ 13).[1] Plaintiff argues that defendant is not entitled to summary judgment because it has failed to establish the lack of any triable issue of fact. Plaintiff asserts that it was not required to sound-proof the floor and that the lease did not require her to do so. Additionally, Plaintiff argues that defendant conflates the soundproofing issue with the complaints about excessive noise, and that to the extent defendant argues that plaintiff's dance studio causes a nuisance to other tenants, that issue is a triable issue of fact. Defendant argues that the issue here is plaintiff's ongoing breach of the lease, and not her failure to install soundproofing in the flooring (Mizrahi Aff. in Reply at ¶ 5).

On August 18, 2016, plaintiff's previous counsel withdrew its representation; plaintiff was *pro se* in this action from that point until August 17, 2017, during which time defendant filed motions to compel payment of the lease, fees, and taxes, the present motion for summary judgment and issuance of a Writ of Assistance, and deposed plaintiff. Plaintiff asserts that it erroneously filed the Note of Issue and Certificate of Readiness on June 29, 2017, mistakenly thinking that she was required to do so to quickly resolve the action and without an understanding of the implications of that filing. Defendant argues that plaintiff, as a *pro se* litigant, engaged in discovery, appeared in court numerous times, and whether plaintiff planned to conduct depositions was discussed at a court conference. Defendant also contends that granting plaintiff's motion and re-opening party discovery would cause a delay and be prejudicial to defendant, given the expiration of the lease.

[1] The lease expired on August 31, 2017 [Lease (ex. 3 to the Mizrahi aff.)].

DISCUSSION

Defendant's Summary Judgment Motion

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Here, there remain triable material issues of fact as to whether plaintiff was in violation of her lease. Defendant's contention that plaintiff has made minimal effort to install a sound-absorbing floor is contested by plaintiff and contradicted by the evidence presented. The terms of the lease do not explicitly state that plaintiff is required to install a sound-proof floor. There is also an issue of fact as to whether the sound issue remains, as plaintiff claims to have installed additional soundproofing material in August 2016. There has been no independent third-party assessment or measurement of the noise and neither party has offered an expert's opinion regarding the noise level. There is also a question of whether the noise that emanates from the dance studio is the noise one would expect to be associated with a dance studio. The parties dispute what actions were taken to minimize the disturbance and whether those actions were

sufficient. For the above reasons, the court denies defendant's motion for summary judgment on the complaint as well as on its counterclaims.

Defendant's Request for a Writ of Assistance

Defendant requests a Writ of Assistance from this court to remove plaintiff from the premises because her lease has expired. On December 4, 2014, the court (Singh, J.) issued an injunction temporarily restraining defendant from taking any action to terminate plaintiff's lease and/or to commence summary proceedings to evict her from the premises, and this injunction remains in effect.

RPAPL § 221 (Compelling delivery of possession of real property) governs Writs of Assistance. "RPAPL § 221 permits the enforcement of a properly rendered order or judgment 'affecting the title to, or the possession, enjoyment or use of, real property.' (citation omitted)" *Heywood Condominium v. Wozencraft*, 148 A.D.3d 38, 47 (1st Dep't 2017). The predicate for relief under RPAPL § 221 is a judgment. *See id.* To date, there is no judgment affecting the title to or the possession, enjoyment, or use of the property. Thus, the decision on issuance of a Writ of Assistance is held in abeyance pending resolution of this action.

Plaintiff's Motion to Vacate the Note of Issue and Certificate of Readiness

Plaintiff moves, pursuant to 22 NYCRR § 202.21(e), to vacate the Note of Issue and Certificate of Readiness, or alternatively, for an Order authorizing plaintiff to take the deposition of Joseph Karten.

22 NYCRR § 202.21(e) (Note of issue and certificate of readiness) states in part:

> (e) *Vacating note of issue.* Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to

> vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.

Plaintiff asserts that since she was *pro se* from August 18, 2016 to August 17, 2017 and did not conduct any depositions in the matter due to her *pro se* status, she would need to conduct additional discovery. She argues that she mistakenly certified that all discovery was complete and that this case was ready for trial. She also contends that she was overwhelmed by the proceedings and did not have a proper understanding of the discovery process, and erroneously filed the Note of Issue on June 29, 2017 mistakenly believing that it was required of her to quickly resolve the action.

Defendant asserts that plaintiff is seeking to delay the case and buy time while continuing in possession of her space, and that plaintiff attempts to rely on her *pro se* status and alleged lack of sophistication in the pre-trial litigation process to reverse her filing. Defendant argues that plaintiff engaged in discovery, appeared in court on numerous occasions, and was informed about depositions, but chose not to conduct any. Defendant also contends that the delay from granting plaintiff's present motion and re-opening discovery would be highly prejudicial to defendant given the expiration of the lease.

The court finds that vacating the Note of Issue and Certificate of Readiness would unduly delay the case, given that the 20-day time limitation since the issuance of a Note of Issue for filing the present motion has expired. Therefore, the court denies plaintiff's motion to vacate the Note of Issue and Certificate of Readiness. The court will, however, permit plaintiff to take the deposition of Joseph Karten, which may be taken on or before May 29, 2018.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant AK Properties Group, LLC's motion, pursuant to CPLR § 3212, for summary judgment in its favor, dismissing plaintiff Julie K. Swift's complaint and granting defendant summary judgment on its counterclaims is denied; and it is further

ORDERED that defendant AK Properties Group, LLC's request for a Writ of Assistance is held in abeyance; and it is further

ORDERED that plaintiff Julie K. Swift's motion, pursuant to 22 NYCRR § 202.21(e), to vacate the Note of Issue and Certificate of Readiness is denied; and it is further

ORDERED that plaintiff Julie K. Swift's request to take the deposition of Joseph Karten, the manager of AK Properties Group, LLC, is granted as set forth above.

This constitutes the decision and order of the court.

3/29/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:		CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
		GRANTED	[ ]	DENIED		GRANTED IN PART	[X] OTHER
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