Ermenegildo Zegna Corp. v L&M 825 LLC
2018 NY Slip Op 31650(U)
March 6, 2018
Supreme Court, New York County
Docket Number: 655204/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

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ERMENEGILDO ZEGNA CORPORATION,

Plaintiff,

- v -

L&M 825 LLC,

Defendant.

INDEX NO. 655204/2016

MOTION DATE _____

MOTION SEQ. NO. 1

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 66, 67, 68, 71

were read on this application for summary dismissal.

HON. BARBARA JAFFE:

In this action, plaintiff seeks a judgment of rescission of the parties' lease and an award of damages related to the lease on other causes of action. By notice of motion, defendant moves, pursuant to CPLR 3212 for an order summarily dismissing the complaint based on documentary evidence and granting it judgment on its counterclaims. Plaintiff opposes.

I. PERTINENT FACTS

On or about April 12, 2013, plaintiff, a world-renowned retailer, entered into a lease with defendant-landlord for floors one, two, and three, and the basement located at 823 Madison Avenue in Manhattan (the premises). Each party is a highly sophisticated business entity represented by highly experienced real estate attorneys. (NYSCEF 15).

The lease commenced on August 1, 2013, and ends on, as pertinent here, July 31, 2023. The demised premises is defined therein as the basement, ground floor, second level, and third level spaces as depicted in an annexed diagram. Plaintiff's permitted use in the premises is retail sales alone, although it was permitted to use the basement space for storage. (NYSCEF 21).

The lease contains the following pertinent provisions:

(1) that plaintiff has inspected the premises and accepts them "as is," and that defendant makes no representations as to the condition of the premises;

(2) that neither defendant nor its agent make any representations as to the physical condition of the building, the premises, or anything else affecting or related to the premises, and that plaintiff's taking possession of the premises is conclusive evidence that the premises and the building are in good and satisfactory condition, except as to latent defects;

(3) all understandings and agreements between the parties are merged into the lease;

(4) subject to defendant's obligation to complete its work, plaintiff agrees it is leasing the premises "as is" and has the sole responsibility to pay for its initial alterations necessary to enable plaintiff to open for business in accordance with "legal requirements," defined as including all laws, orders, regulations, etc. related to the premises and their use and occupancy and the provisions of the building's certificate of occupancy (C of O);

(5) plaintiff at its own cost and expense must comply with the legal requirements and obtain approval of plans and specifications;

(6) plaintiff bears the responsibility for complying with the legal requirements regardless of defendant's approval or consent to any plans or specifications;

(7) plaintiff acknowledges that defendant makes no representations as to the condition of the premises or as to their fitness or sufficiency for plaintiff's use and requirements;

(8) plaintiff acknowledges having reviewed and being familiar with the C of O currently in effect; and

(9) defendant must cooperate with plaintiff in connection with plaintiff obtaining the required permits and C of O for plaintiff's alterations.

(*Id.*).

It is undisputed that when it entered into the lease, plaintiff was aware that 823 Madison Avenue and 825 Madison Avenue comprised a single building, and that a wall would have to be constructed to divide the space. In June 2013, defendant's architect filed an application with the Department of Buildings (DOB) to construct the wall. In an emailed recap of a meeting of the parties' respective architects, dated June 23, 2013, it is reported that defendant's architect stated that the division of the space will be "permitted by [defendant's architect] with a 'Professional certification Alt2 D14' application to the DOB," and, that

> [t]he application will depict solely the partitions to be installed for the purpose indicated; it will not include or dictated the proposed layout of the tenant's space, nor illustrate egress, which will be addressed in the individual applications filed by the tenant's appointed professionals.

It is additionally reported in the email that defendant's architect had verified with the DOB that plaintiff's build-out would be permitted under the existing C of O. (NYSCEF 37).

The wall was built in August 2013, and thereafter, plaintiff began its build-out of the premises pursuant to plans agreed to by the parties. In September 2013, when plaintiff's architects filed applications with DOB for construction permits, they were told that as a result of the construction of the wall and the resulting loss of a means of egress into plaintiff's premises, the C of O permitting retail use of the second and third floors was no longer valid. (NYSCEF 31, 38).

Due to the invalidity of the C of O, plaintiff alleges in its complaint that it was unable to use the second and third floors for retail use for almost two years, that it had to alter its planned work to rectify the situation, and that it took several years for it to obtain contingency approval for its plans, resulting in the loss of millions of dollars in paid rent for space it could not use. (NYSCEF 1).

The extent of plaintiff's efforts to obtain a valid C of O and defendant's assistance with those efforts are in dispute.

II. CONTENTIONS

In support of its motion, defendant relies in large part on the lease, maintaining that plaintiff's claims are precluded by the tasking therein of plaintiff with the sole responsibility for obtaining a valid C of O, and that plaintiff had accepted the premises "as is." It denies a mutual mistake and observes that plaintiff assumed the risk that the C of O would be invalidated by the construction of the wall, observing that in the lease, it is specifically provided that it made no representations concerning the C of O. If there had been a mistake, moreover, defendant claims that plaintiff failed to exercise due diligence and discover it before signing the lease, and as the lease is enforceable, plaintiff's breach of contract claims are not meritorious, as plaintiff alone breached it by surrendering the premises before the expiration of the lease and without obtaining a valid C of O. Absent a breach on its part, defendant also denies a cognizable breach of the covenant of good faith and fair dealing, and adds that the unjust enrichment claim is barred by the existence of the lease. Defendant also claims entitlement to recover on its counterclaims for overdue rent and additional rent and for attorney fees. (NYSCEF 15).

Plaintiff maintains that the architects for both parties mistakenly believed that the C of O would not be adversely impacted by the construction of the wall based on the representation made by defendant's architect that he had confirmed with the DOB that the C of O would not be invalidated by the building of the wall. Moreover, it argues, the mistake was defendant's fault, defendant did not sufficiently assist in correcting the mistake, and it was not able to use the premises for the purpose for which it had leased it. It also argues that its claims are meritorious

and that judgment on defendant's counterclaims is premature given the triable issues as to its claims, and observes that discovery has not yet been exchanged. (NYSCEF 63).

III. ANALYSIS

A contract entered into under a mutual mistake of fact is voidable and may be reformed or rescinded. The mistake must exist when the contract was executed, the facts underlying the mistake must be substantial and both parties must be mistaken as to the same fact. (*Eisenberg v Hall*, 147 AD3d 602 [1st Dept 2017]).

However, if a party, in the exercise of ordinary care, should have known or could have easily ascertained the allegedly mistaken fact, then it will be deemed to have been consciously ignorant of it, and may not advance a claim of mutual mistake to seek rescission or other damages. (*Id.* at 604). One is deemed consciously ignorant of a mistake only when it is aware that its knowledge is limited and nonetheless enters into the contract, thereby assuming the risk that there may be a mistake. (*Id.*). A party may also assume the risk of a potential mistake if it fails to utilize readily accessible means of knowledge to investigate the issue (*Da Silva v Musso*, 53 NY2d 543 [1981]), and it has been held that a party who does not "go beyond its own efforts to ascertain relevant facts (such as obtaining experts' reports)," may be held "to bear the risk of mistake if it chooses to act on its otherwise limited knowledge." (*P.K. Dev., Inc. v Elvem Dev. Corp.*, 226 AD2d 200, 201-202 [1st Dept 1996]). A party may be found to have been consciously ignorant only if it was "aware that his knowledge is limited but decides to contract anyway in the hope that the facts accord with his wishes, thus assuming the risk of the existence of the doubtful fact as one of the elements of the bargain." (*Eisenberg*, 147 AD3d at 605 [internal quotes omitted]).

Here, as defendant raises the issue of whether plaintiff was consciously ignorant of the possibility that the DOB would invalidate the C of O due to the construction of the wall, a summary disposition of the action would be inappropriate at this juncture of the litigation. (CPLR 3212[f]; *cf. Eisenberg*, 147 AD3d at 604 [although both parties mistakenly believed art at issue was ancient, factual issues existed as to whether plaintiff bore risk of mistake due to conscious ignorance]). For the same reason, a disposition of the other causes of action and defendant's counterclaims would be premature.

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied in its entirety.

3/6/18

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
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