Times Sq. Souvenirs Inc. v Big Apple Entertainment Partners, LLC
2018 NY Slip Op 32231(U)
September 11, 2018
Supreme Court, New York County
Docket Number: 650686/2017
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – IAS PART 3

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TIMES SQUARE SOUVENIRS INC.,
a New York Corporation,

Plaintiff,

-against-

BIG APPLE ENTERTAINMENT PARTNERS, LLC
d/b/a RIPLEY'S BELIEVE IT OR NOT,
a Delaware Limited Liability Company

Defendant,

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Index No.: 650686/2017
Motion Date: 11/06/2017
Motion Sequence 001

BRANSTEN, J.

This action comes before the Court on Defendant Big Apple Entertainment Partners, LLC d/b/a Ripley's Believe It or Not's ("Big Apple") motion to dismiss Plaintiff Times Square Souvenirs, Inc.'s ("Times Square") Amended Verified Complaint pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff opposes the motion. For the reasons set forth below, Big Apple's motion to dismiss is granted in part as to the breach of contract claim and denied in part as to the breach of the covenant of good faith and fair dealing and promissory estoppel claims.

I. BACKGROUND

Defendant Big Apple operates a Ripley's Believe It or Not! museum pursuant to a franchise agreement with non-party Ripley's Attractions Inc., dated March 24, 2006 (the "Franchise Agreement"). (Pidgeon Affid. Ex. G.) On May 11, 2006, Big Apple entered into a lease agreement (the "Lease Agreement") with non-party FC 42nd Street

Associates, L.P. (the "Landlord") for the building and premises located in Times Square at 234 West 42nd Street, New York, NY (the "Museum"). (Pidgeon Affid. Ex. H.) The Lease Agreement contained a provision that provided "Tenant shall not . . . (ii) sublet the Premises or any part thereof, or offer or advertise to do so, or allow the same to be used, occupied or utilized by anyone other than Tenant . . . without in each instance obtaining the prior written consent of Landlord, which consent may be granted or withheld in Landlord's sole discretion." (*Id.* ¶ 18.01(a).)

Plaintiff Times Square is a retail gift and souvenir store operator. (Am. Compl. ¶ 5.) On October 24, 2016, Times Square entered into a license agreement (the "License Agreement") with Defendant Big Apple, which granted Times Square non-exclusive use of a portion of the ground floor of the Museum to operate a gift concession area. (*Id.* ¶¶ 7, 9; Pidgeon Affid. Ex. A.) The License Agreement was effective as of November 1, 2016 and had a term of five years, up to and including October 31, 2021. (Am. Compl. ¶ 8.) The License Agreement also provided that the agreement was "subject and subordinate to . . . any and all lease and ground lease Agreements, made or arranged by [Big Apple] of its interest in all or any part of the Building or Premises." (Pidgeon Affid. Ex. A ¶ 19.)

Times Square performed all of its obligations under the License Agreement. (Am. Compl. ¶ 20.) Times Square tendered the $18,000 security deposit to Big Apple and paid $16,900 to purchase Big Apple's pre-existing inventory at the Museum. (*Id.* ¶ 12.) After the execution of the License Agreement, Times Square hired a designer and contractors

to prepare the space for retail operations. (*Id.* ¶ 13.) Times Square also purchased merchandise, equipment, lighting, and store and display fixtures for the concession. (*Id.*)

On October 18, 2016, Big Apple's General Manager, Bret Pidgeon, emailed Times Square's attorney to advise her that Big Apple had written approval from its franchisor, Ripley Entertainment Inc., to proceed with the License Agreement. (Pidgeon Affid. ¶ 17.) Mr. Pidgeon also informed Time Square's attorney that Ripley Entertainment Inc. would have "approval rights over the final design and layout of the renovated concession as per the terms of the License Agreement and the Franchise Agreement." (*Id.*) However, Mr. Pidgeon asserts he did not make any representations regarding the Landlord's consent to the License Agreement. (*Id.* ¶ 18.) On November 18, 2016, Times Square commenced its business operations at the Museum with a fully-finished concession and fully-stocked inventory. (Am. Compl. ¶ 15.)

On November 22, 2016, a representative of Big Apple told Times Square to immediately cease its operation and vacate the premises. (*Id.* ¶ 16.) The representative stated that "the order came from above." (*Id.*) Times Square complied with this directive and vacated the premises. (*See id.* ¶ 17.) Subsequently, Times Square's representatives allegedly observed that the premises vacated by Times Square were being exhibited to a prospective tenant. (*Id.*)

Times Square commenced this action on February 2, 2017 by Summons and Verified Complaint and filed an Amended Verified Complaint on April 19, 2017. Times

Square asserts three causes of action against Big Apple for breach of contract, promissory estoppel, and breach of covenant of good faith.

II. ANALYSIS

Presently before the Court is Big Apple's motion to dismiss the Amended Verified Complaint pursuant to CPRL 3211(a)(1) and 3211(a)(7).

A. Legal Standard

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the complaint must be construed in a light most favorable to the plaintiffs, all factual allegations must be accepted as true and all inferences which reasonably flow therefrom must be resolved in favor of the plaintiff. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). The Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d

154, 154 (1st Dep't 1993). The Court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

B. Breach of the License Agreement

Under New York law, the elements of a cause of action for breach of contract are (1) the parties entered into a valid agreement, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage. *See VisionChina Media Inc. v. S'holder Representative Servs., LLC*, 109 A.D.3d 49, 58 (1st Dep't 2013).

Times Square alleges Big Apple breached the License Agreement when it terminated the License Agreement and failed to tender the license to use and occupy the premises. Big Apple argues that the Landlord's written consent was a condition precedent to the License Agreement, and due to the Landlord's refusal to consent to the License Agreement, there was no breach.

The Lease Agreement between the Landlord and Big Apple provides that any sublet or license agreement was subject to the Landlord's "prior written consent," which "may be granted or withheld in Landlord's sole discretion." (Pidgeon Affid. Ex. H ¶ 18.01.) In turn, the License Agreement between Big Apple and Times Square provides

that the agreement would be "***subject and subordinate*** to . . . any and all lease and ground lease Agreements, made or arranged by [Big Apple] of its interests in all or any part of the Building or Premises." (*Id.* Ex. A ¶ 19 (emphasis added).) When a sublease uses the term "subject and subordinate to," the sublease is bound to the terms of the lease. *See Getty Props. Corp. v. Getty Petroleum Mktg. Inc.* 106 A.D.3d 429, 429 (1st Dep't 2013); *Inst. for Eastwest Studies, Inc. v. Nat'l Audubon Soc., Inc.*, 17 Misc. 3d 1108(A), at 5 (Sup. Ct. N.Y. Cnty. 2007) (finding "subject and subordinate" clause incorporates by reference the terms of the overlease into the sublease). Therefore, the Landlord's prior written consent was required for Times Square to obtain the right to use and occupy the premises under the License Agreement.

"When a lease provides for a term to commence upon the happening of a future event, if the event does not occur no tenancy is created." *Duane Reade v. I.G. Second Generation Partners, L.P.*, 280 A.D.2d 410, 411–12 (1st Dep't 2001) (internal quotation marks omitted.) Here, Big Apple failed to obtain the Landlord's prior written approval for the License Agreement. (Pidgeon Affid. ¶ 18.) Moreover, Big Apple lacked the authority to waive its obligation to obtain written consent from the Landlord because "a sublease can confer no greater rights on a sublessee than those afforded to the tenant by his prime lease." *Millicom Inc. v. Breed, Abbott & Morgan*, 160 A.D.2d 496, 497 (1st Dep't 1990) ("[w]hile [tenant] may waive a provision of its sublease agreement with [sublessee], it is without the power to waive a condition of its lease with [landlord]"). Thus, Times Square never became a licensee but remained a potential licensee whose

interest in the premises remained expressly conditioned upon the Landlord's written consent. *See Duane Reade*, 280 A.D.2d at 412.

The plain terms of the Lease Agreement and License Agreement establish Big Apple could not provide Times Square with the right to use a portion of the ground floor of the Museum without the Landlord's written consent. The Landlord ultimately refused to consent to the License Agreement. Therefore, Big Apple has conclusively established a defense to Times Square's breach of contract claim. Accordingly, Big Apple's motion to dismiss Time Square's claim for breach of the License Agreement is granted to the extent such claim is based on Big Apple's termination of the License Agreement and failure to tender the license to use and occupy the premises.

C. **Breach of the Covenant of Good Faith and Fair Dealing**

Times Square also alleges Big Apple breached the License Agreement's implied covenant of good faith and fair dealing. In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). This embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995).

Here, Times Square's right to use the premises was conditioned on the Landlord's written consent to the License Agreement. Accordingly, Time Square's benefit of the

bargain would undoubtedly be destroyed by the lack of the Landlord's consent. By executing the License Agreement with Times Square, Big Apple had a duty to make good faith efforts to obtain the Landlord's consent to the License Agreement. Therefore, Big Apple's motion to dismiss the breach of the implied covenant of good faith and fair dealing is denied.

D. Promissory Estoppel

Finally, Times Square alleges Big Apple promised that all approvals were secured, which Times Square relied upon in expending a substantial amount of time and money on construction and retrofitting the concession for operation. To state a claim for promissory estoppel, Plaintiff must allege (1) Defendant made a promise that is sufficiently clear and unambiguous; (2) Plaintiff reasonably relied on Defendant's promise and (3) injury was caused by the reliance. *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 841-42 (1st Dep't 2011).

Big Apple argues Times Square's promissory estoppel claim is precluded by the License Agreement. A promissory estoppel claim will be dismissed as duplicative of a breach of contract claim where there is an absence of a duty independent and extraneous to the contract. *See Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 303 (1st Dep't 2008). Here, Times Square alleges that Big Apple, through its general manager, Mr. Pidgeon, represented that it had secured all approvals necessary for Times Square to proceed with performance under the License Agreement. (Am. Compl. ¶ 23.) As noted above,

obtaining the Landlord's written approval was a condition precedent to the License Agreement. However, the License Agreement does not appear to contain a promise that Big Apple would secure all necessary approvals for the License Agreement. Thus, Mr. Pidgeon's representations that Big Apple had obtained any necessary approvals, while related to the conditions precedent, were separate and extraneous to Big Apple's obligations under the License Agreement. Therefore, the promissory estoppel claim is not duplicative of the breach of contract claim.

Big Apple also argues Times Square fails to allege reasonable reliance on Mr. Pidgeon's representations. Big Apple asserts Mr. Pidgeon's email, dated October 18, 2016, only states that Big Apple obtained approval from Ripley Entertainment Inc. to move forward. (Pidgeon Affid. Ex. F at 1.) However, the October 18th email, by itself does not conclusively establish a defense to Times Square's promissory estoppel claim. At this point the Court cannot conclude that it was unreasonable for Times Square to interpret this email as the final approval Times Square required to move forward with its use and occupancy of the premises. This is especially true in light of the allegation that Big Apple observed Times Square remodeling, outfitting, and retrofitting the licensed premises but did not inform them of the absence of the Landlord's consent until four days after Times Square commenced operations at the Museum. Thus, the Court cannot determine at this time that Times Square's reliance on Mr. Pidgeon's representations were unreasonable.

Therefore, Big Apple's motion to dismiss the promissory estoppel claim is denied.

III. CONCLUSION

ACCORDINGLY, it is hereby

ORDERED, that Defendant's motion to Dismiss is GRANTED IN PART as to Times Square's breach of contract claim and DENIED IN PART as to Times Square's breach of the implied covenant of good faith and fair dealing and promissory estoppel claims.

This constitutes the decision and order of the Court.

Dated: New York, New York
September 11, 2018

ENTER:

HON. EILEEN BRANSTEN
J.S.C.