Agatha LLC v Heller
2018 NY Slip Op 32636(U)
October 10, 2018
Supreme Court, New York County
Docket Number: 150619/2015
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

---X

AGATHA LLC, and CATHERINE RUSSELL

Plaintiffs,

- v -

STEVEN HELLER,

Defendant.

---X

INDEX NO. 150619/2015

MOTION DATE 09/15/2017

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

ORDER

Upon the foregoing documents, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

In this action alleging legal malpractice, defendant Steven B. Heller, Esq. moves for summary judgment dismissing the complaint.

Background

Plaintiffs are Agatha LLC (Agatha) and a managing member, Catherine Russell. The essence of plaintiffs' claims is that in

challenging Agatha's former landlord's notices to terminate the lease, Heller negligently failed to commence action and obtain a Yellowstone injunction, resulting in the termination of Agatha's leasehold.

Russell states that she has worked as a theater production manager since 1993. In September 2013, Agatha rented space in a building in the Manhattan Times Square neighborhood to create an Off-Broadway theater. The space "required substantial construction" before it could be opened to the public.

Renovation was proceeding when, on August 15, 2014, the landlord served Agatha with a 30-day notice of default, with a cure date of September 24, 2014, more than 30 days after the date of the notice. The 30-day notice stated that Agatha had failed to maintain the types and amounts of insurance required under the lease and had performed work and made alterations to the premises in violation of the lease. The notice stated that Agatha did not obtain the needed permits from the NYC Department of Buildings or the landlord's prior written consent to change the premises. The notice listed alterations such as removing walls, flooring, ceilings, and lighting, and blocking windows. The notice further stated that the insurance defaults were incurable under the lease.

Russell turned to attorney Heller for assistance. Heller states that he has known Russell for about 15 years, and that he

had written about five "cease and desist" letters for her. He says that his legal services on her behalf had extended no further until she asked him to write to the landlord about resolving the issues raised in the default notice.

On September 4, 2014, Heller wrote to the landlord's attorney enclosing three certificates of insurance, to show that Agatha had insurance, and Agatha's rent checks for July, August, and September 2014. The letter noted that the landlord had rejected the rent checks for July and August 2014. The letter stated that construction plans "have been" submitted to the landlord for approval, which was awaited, and that the work on the premises was performed pending the landlord's approval.

Both sides agree that the coverage reflected by Agatha's insurance certificates did not comply with the insurance requirements in the lease. The certificates are dated June 30, 2014, August 29, 2014, and September 4, 2014. Only the last one dates to the start of the lease period in September 2013. The lease required coverage from the start. None of the certificates reflect the coverage amounts specified in the lease. Russell states that she thought that the landlord would be willing to negotiate the insurance issue and arrive at a compromise. Her insurance broker had informed her that the lease required unnecessarily high levels of coverage and that it was customary for theaters to maintain lower levels of coverage

before opening. Plaintiffs' insurance expert, Kevin A. Luss, says the same in his affidavit, adding that often in the theater industry the lease will begin to run before insurance is procured, and that it is usual for a tenant to obtain back-dated insurance. As for the alterations, Russell does not deny the statements in the 30-day notice. When deposed, Russell testified that the alterations were not structural, implying that they were not performed in breach of the lease. In their opposition papers, plaintiffs do not otherwise address the alterations.

On September 8, 2014, the landlord's attorney returned the checks. The attorney's letter stated that the insurance certificates showed that Agatha's coverage was not in compliance with the lease terms, that the insurance defaults were not curable, and that Heller's client had performed construction before the landlord's approval. According to Heller, between September 8 and September 23, he and the landlord's attorney discussed renegotiating the insurance requirements and Russell's efforts to procure the correct insurance. The landlord's attorney told Heller that she would talk to her client and get back to him, which she did not do. Heller wrote the attorney on September 23, resubmitting the rent checks and the two most recent insurance certificates, and stating that, "you were to

discuss a resolution of" the landlord's refusal to accept rent from Heller's client.

Heller alleges that he repeatedly and frequently told Russell that he did not do Supreme Court work, and that if the landlord did not agree to a resolution of the issues raised in the default notice, she would have to find another attorney who could go to the Supreme Court and obtain an injunction to renegotiate the insurance clause in the lease. He told Russell that she needed to get insurance that complied with the lease and that she would have a better chance of getting the injunction if she did. He told her that she had 30 days from the date of the 30-day notice to get an injunction in Supreme Court. Heller further alleges that Russell understood that not getting the right insurance could mean loss of the lease. Heller also says that he believed that Russell could not get the right insurance and that his job was to negotiate with the landlord to see if lower coverage was acceptable.

There was no written retainer. Heller says that he asked to see the lease, but that Russell did not send it to him, and that he knew that the insurance certificates did not reflect the insurance required under the lease. Heller says that he started looking for an attorney for Russell when she told him that she could not find anyone to do Supreme Court work.

The cure period ended on September 24, 2014. On October 2, the landlord served Agatha with a seven-day notice of termination of the lease, effective October 13. Russell states that she retained Bruce Lederman on October 16, on Heller's recommendation. That same day, Lederman filed a declaratory judgment action on Agatha's behalf against the landlord in Supreme Court. Lederman says that since the lease had already ended on October 13, there was no point in applying for a Yellowstone injunction. On October 17, a temporary restraining order (TRO) issued, restraining the landlord from commencing or prosecuting any summary proceeding to recover possession of the premises provided Agatha paid use and occupancy. On November 5, Agatha stipulated to discontinue the declaratory judgment action against the landlord. The stipulation stated that Agatha and the landlord had settled the action subject to terms and conditions set forth in another stipulation. The landlord agreed to pay Agatha $500,000, the amount allegedly spent on renovations, and Agatha agreed to give up the lease and vacate the premises.

Plaintiffs allege that the termination of the lease caused damages of almost $1.29 million in lost income per year for eight of the approximately nine years remaining on the lease. The lost income includes anticipated revenue from theaters that were to occupy the space, from a coffee shop that would have

been a sub-tenant, from sponsorships, from corporate events, and from concessions. Moreover, Agatha lost the right to renew the lease for five more years, and incurred expenses for legal fees, insurance, architects, contractors, rent, utilities, the security deposit, and other items.

Heller charged Agatha $300 for his services. He states that the low fee is evidence that his representation was limited to corresponding with the landlord to resolve the issues in the notice. Heller denies that he was negligent and says that he did what he was retained to do. Heller says that the landlord would not have agreed to amend the terms of the lease to lower the insurance requirements. Before August 2014, as Agatha began the renovations, the landlord had contracted to sell the premises. On October 2, 2014, the landlord issued the notice of termination, despite receiving the three certificates of insurance. According to Heller, these facts make it clear that the landlord would not have agreed to accept lower insurance coverage and would have proceeded to terminate Agatha's leasehold.

Heller also argues that, even if he was negligent, he did not cause Agatha to incur damages. Even if he had applied for a Yellowstone injunction, it would not have been granted, because the insurance defaults were incurable. Moreover, Heller continues, even if Agatha had obtained a Yellowstone injunction,

Agatha ultimately would not have prevailed, because it could not have obtained the insurance required under the lease. Under either scenario, the leasehold would have terminated. Thus, applying for an injunction would not have led to a result different from what transpired.

As evidence that Agatha would have had to vacate the premises regardless of his actions, Heller points to Russell's testimony, that she told Lederman that she was not sure if Agatha could stay in the premises, since the building had been sold and probably was going to be demolished. The court notes that Russell also stated that, even if Agatha had not been able to stay in the building, it would have gotten a better settlement if a Yellowstone injunction had been in place. However, Heller states that there is no evidence that the landlord would have paid a larger settlement amount.

Plaintiffs' position is that, if Agatha had obtained a Yellowstone injunction, negotiations might have led to the landlord agreeing that the tenant's insurance did not have to be exactly what was called for in the lease. In the event the landlord did not agree, Agatha would cure the insurance defaults. Russell says that she could have obtained the correct amounts of insurance on a retroactive basis.

Russell does not deny that Heller told her that she needed another attorney. Russell alleges that Heller did not explain

the importance of exact compliance with the insurance requirements of the lease before the cure period expired, did not discuss whether the insurance met the requirements in the lease, did not discuss whether Agatha could obtain a ruling lowering the insurance coverage required in the lease, and did not recommend a Yellowstone injunction to preserve the leasehold. Russell states that it was on the advice of Lederman that she sought insurance for Agatha that exactly complied with the lease requirements.

Analysis

As the one seeking summary judgment, Heller has the initial burden to show entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case (CPLR 3212; Santiago v Filstein, 35 AD3d 184, 185-186 [1st Dept 2006]). Once the movant has made this prima facie showing, the party opposing the motion must produce evidence showing that the case raises material issues of fact (Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]). While deciding a summary judgment motion, the court interprets the evidence in the light most favorable to the opponent of the motion (see Branham v Loews Orpheum Cinemas, 8 NY3d 931, 932 [2007]). Nonetheless, the opponent must produce proof establishing that its claims are real and can be substantiated at trial (Tobron Off. Furniture Corp. v King World

Prods., 161 AD2d 355, 357 [1st Dept 1990]). Expressions of hope and unsubstantiated and unsupported assertions are not enough to defeat a motion (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

Legal malpractice occurs when an attorney does not exercise the ordinary reasonable skill and knowledge customarily possessed by a member of the legal profession, and this failure on the attorney's part proximately causes his or her client to sustain actual and ascertainable damages (Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015]; AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434 [2007]). To establish proximate cause, the plaintiff claiming legal malpractice must demonstrate that, but for the attorney's negligence, the plaintiff would have prevailed in the underlying matter, would have had a more favorable outcome, or would not have sustained ascertainable damages (Brooks v Lewin, 21 AD3d 731, 734 [1st Dept 2005]; Dweck Law Firm v Mann, 283 AD2d 292, 293 [1st Dept 2001]). The failure to demonstrate proximate cause mandates the dismissal of a legal malpractice action, regardless of the attorney's negligence (Schwartz v Olshan Grundman Frome & Rosenzweig, 302 AD2d 193, 198 [1st Dept 2003]; Hill v Fisher & Fisher, 203 AD2d 328, 329 [2d Dept 1994]).

Assuming defendant establishes a prima facie defense in a legal malpractice action, a plaintiff's burden in refuting such

case is "a heavy one. The plaintiff must prove first the hypothetical outcome of the underlying litigation and, then, the attorney's liability for malpractice in connection with that litigation" (Lindenman v Kreitzer, 7 AD3d 30, 34 [1st Dept 2004]). This means the plaintiff must prove a "case within a case" sufficiently to convince the fact finder in the malpractice case that a fact finder in the underlying case would have arrived at a different result but for the attorney's negligence in the underlying case (id. [internal quotation marks and citation omitted]; see also Aquino v Kuczinski, Vila & Assoc., P.C., 39 AD3d 216, 219 [1st Dept 2007]). The attorney's negligence is not the proximate cause of the harm if the client cannot demonstrate its likelihood of success in the underlying case absent the negligence (Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, 301 AD2d 63, 67 [1st Dept 2002]; Pellegrino v File, 291 AD2d 60, 63 [1st Dept 2002]).

Where an attorney's motion to dismiss is premised on the argument that the client could not have succeeded on its underlying claim, the attorney must show that the plaintiff would have been unable to prove one of the essential elements of the claim (Burbige v Siben & Ferber, 152 AD3d 641, 642 [2d Dept 2017]; Velie v Ellis Law, P.C., 48 AD3d 674, 675 [2d Dept 2008]).

Heller contends that Agatha either could not have qualified for a Yellowstone injunction and/or could not have cured the defaults. Thus, an essential element of the claim is absent as Agatha could not have prevailed over the landlord and avoided termination of the lease.

The landlord's notice advised Agatha that if the defaults were not cured by a certain date, the leasehold would be terminated. A Yellowstone injunction imposes a stay that prevents the landlord from terminating a leasehold by the cure date, thereby affording the tenant an opportunity to cure the default specified in the landlord's notice and avoid forfeiture of the leasehold (Universal Communications Network, Inc. v 229 W. 28th Owner, LLC, 85 AD3d 668, 669 [1st Dept 2011]; CC Vending, Inc. v Berkeley Educ. Servs. of N.Y., Inc., 74 AD3d 559, 559 [1st Dept 2010]; Empire State Bldg. Assoc. v Trump Empire State Partners, 245 AD2d 225, 227 [1st Dept 1997]). If the tenant cannot cure the default, it loses its leasehold. To succeed on a motion for a Yellowstone injunction, the tenant must show "that it is prepared and has the ability to cure the alleged default [as specified in the notice] by any means short of vacating the premises" (CC Vending, 74 AD3d at 559). If the default is not susceptible to cure, the Yellowstone application will be denied (see Zona, Inc. v Soho Centrale, 270 AD2d 12, 14 [1st Dept 2000]).

Given that the law does not favor forfeiture of leaseholds, tenants are generally granted a Yellowstone injunction on less than the normal showing required for a preliminary injunction, and need not demonstrate a likelihood of success on the merits (TSI W. 14, Inc. v Samson Assoc., LLC, 8 AD3d 51, 53 [1st Dept 2004]; see also Post v 120 E. End Ave. Corp., 62 NY2d 19, 25 [1984]). Courts tend to be liberal in determining requests for Yellowstone injunctions, granting them "where there is even a minimal demonstration of efforts to cure and the willingness to do so" (New York City Constr., Inc. v Morgenstern Bros. Realty Inc., 51 Misc 3d 1222[A], 2016 NY Slip Op 50776[U], *8 [Sup Ct, Kings County 2016]; see also Herzfeld & Stern v Ironwood Realty Corp., 102 AD2d 737, 738 [1st Dept 1984]). A tenant is not required to prove its ability to cure prior to obtaining a Yellowstone injunction (WPA/Partners v Port Imperial Ferry Corp., 307 AD2d 234, 237 [1st Dept 2003]). Rather, the court asks whether there is a basis for believing that the tenant can do so without removing itself from the premises (id.).

Case law has consistently held that a tenant's failure to maintain insurance coverage as required by the lease can be an incurable default (166 Enters. Corp. v I G Second Generation Partners, L.P., 81 AD3d 154, 158 [1st Dept 2011] [plaintiff must show readiness and ability to procure and maintain the requisite insurance before expiration of cure period]; Kyung Sik Kim v

Idylwood, N.Y. LLC, 66 AD3d 528, 529 [1st Dept 2009] [plaintiff's ability and readiness to procure prospective coverage was insufficient to cure violation of failing to continuously maintain insurance coverage as required by lease]; Brainerd Mfg. Co. v Dewey Garden Lanes, 78 AD2d 365, 367 [4th Dept 1981] [plaintiff's failure to insure building to full replacement value constituted a material breach of the lease, and warranted termination by the landlord]; Kramer v Bohensky, 27 Misc 3d 1237[A], 2010 NY Slip Op 51089[U], *6 [Sup Ct, Kings County 2010] [failure to procure insurance coverage is incurable as a matter of law]).

Agatha's lease provided that the tenant must purchase commercial general liability insurance with at least the following limits: $5 million general aggregate, $5 million products/completed operations aggregate, $3 million per occurrence, $3 million personal and advertising injury, $3 million tenant's legal liability, and $5,000 medical expenses. The tenant was to procure tenant's property insurance for 100% replacement value, workers' compensation and disability insurance, and $25 million per occurrence in umbrella or excess insurance. If the tenant did work and made alterations to the premises, builder's risk insurance was required. Coverage was required from September 1, 2013.

As stated, Agatha did not adhere to the lease. For instance, the September 4, 2014 certificate of insurance reflects $1 million coverage per occurrence and $1 million general aggregate and there is no property insurance. Plaintiff's expert Luss states that Agatha did not have to comply with the workers' compensation requirement, since businesses owned by one individual with no employees do not have to obtain that kind of insurance. However, Luss does not state that Agatha in fact had no employees.

Each certificate recites that this "certificate is issued as a matter of information only and confers no rights upon the certificate holder." A certificate of insurance that states that it is issued as a matter of information only is not conclusive proof that the tenant is able to cure the default (see JT Queens Carwash, Inc. v 88-16 N. Blvd., LLC, 101 AD3d 1089, 1090 [2d Dept 2012]). Given that the certificates do not show that the insurance was, in fact, obtained, and given the wide variance between the coverage that may have been obtained and the lease requirements, Agatha did not meet her burden of demonstrating that she would have obtained a Yellowstone injunction, despite the court's liberal standards. In addition, assuming Agatha had demonstrated to a court that it could have cured the insurance defaults and been granted a Yellowstone

injunction, its ultimate ability to obtain the correct coverage is not demonstrated.

Plaintiffs contend that Agatha could have obtained retroactive insurance to cover the period from the start of the lease. Yellowstone injunctions have been granted based on the tenant's willingness and ability to obtain retroactive insurance to protect the landlord for the period in default (Great Wall 384, Inc. v 384 Grand St. Hous., 2016 WL 5672959, *1 [Sup Ct, NY County 2016]; see Federated Retail Holdings, Inc. v Weatherly 39th St., LLC, 32 Misc 3d 247, 254 [Sup Ct, NY County 2011], affd 95 AD3d 605 [1st Dept 2012]). In Discount Columbia LLC v Bogopa-Columbia, Inc. (2017 WL 2909360 [Sup Ct, Kings Count 2017]), the court found that the tenant had the potential means to cure the default and granted a Yellowstone injunction, where the tenant asserted that it had continuously carried coverage and could amend its existing policy to provide retroactive umbrella coverage.

Here, Agatha did not continuously carry coverage, and the retroactive insurance was not just required for the umbrella insurance but for the primary coverage, as well. The certificate dated September 4, 2014 shows that Agatha was offered insurance from the time required by the lease. However, the coverage amounts are lower than that required under the lease. An email dated October 22, 2014, shows that the broker

offered Agatha retroactive insurance, which again did not comply with the lease requirements, and there is no allegation that retroactive insurance was indeed purchased. Russell states that, "I was able to get offers of retrospective insurance from my insurance broker for the amount of insurance required by the lease". "If I was required to get higher levels of insurance that exactly complied with the lease to preserve the leasehold I would have done so". Even under the liberal standard, these statements are not sufficient to demonstrate plaintiffs' motivation and plausible means to cure the default (see WPA/Partners, 307 AD2d at 237).

Regarding plaintiffs' arguments that the landlord might have agreed to amend the lease to reduce the insurance requirements, there is no evidence for that. Speculative assertions about what might have happened had the attorney taken a different approach do not support malpractice claims (see Citidress II Corp. v Toyaker, 105 AD3d 798, 798 [2d Dept 2013]). Indeed, Russell testified that she did not know what the new landlord would do. Nor is there any reasonable basis for thinking that a court would amend the lease. The court cannot rewrite parties' agreements (Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004]).

Regarding the alterations, the 30-day notice of default refers to the parts of the lease providing that the tenant must

obtain the landlord's prior approval and government permits and must submit to the landlord an architect's statement before making "any alterations, additions or improvements" to the premises. Plaintiffs make no claim that they would have cured such defaults (see generally 18 Assoc., LLC v Court St. Pizza, Inc., 57 Misc 3d 1204[A], *33-34, 2017 NY Slip Op 51222[U] [Civ Ct, Kings County 2017]).

In contrast, a Yellowstone injunction may be granted where a tenant takes "substantial steps" to cure a building violation and actively works toward that goal (Baruch, LLC v 587 Fifth Ave., LLC, 44 AD3d 339, 340 [1st Dept 2007]); has continuously stated that it "stands ready, willing and able to cure any alleged default if found to exist" (New York Classic Motors, LLC v 250 Hudson St., LLC, 2013 WL 5925541, *2 [Sup Ct, NY County 2013]); or has indicated that it was "willing to repair any defective condition found by the court and by providing proof of the substantial efforts it has already made in addressing the . . . condition" (TSI W. 14, 8 AD3d at 52-53; see W & G Wines LLC v Golden Chariot Holdings LLC, 46 Misc 3d 1202[A], 2014 NY Slip Op 51781[U], *8 [Sup Ct, Kings County 2014]).

Heller demonstrates that Agatha would not have prevailed in the case against the landlord. Plaintiffs fail to show that there is an issue of fact in that regard. Additionally, nothing is alleged here to show that Agatha would have gotten larger

damages if a Yellowstone injunction had issued. Such claim is mere speculation.

Heller argues that Russell has no standing to maintain this action. It is correct that "[a] member of an LLC cannot be either a plaintiff or defendant in an action brought against or on behalf of an LLC, except to enforce the member's right against or liability to the LLC" (1 NY Prac, New York Limited Liab Companies and Partnerships § 7:14). Contrary to her arguments, Russell does not have standing by reason of being the guarantor of Agatha's lease. The complaint contains no allegations that Heller had a duty to Russell as guarantor or that he injured her outside of her role as managing member of Agatha.

10/10/2018
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE