1809 Emns Ave Inc. v 1809 Emmons Ave. Dev. LLC
2018 NY Slip Op 32651(U)
October 9, 2018
Supreme Court, Kings County
Docket Number: 511382/18
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

----------x

1809 EMNS AVE INC.,

Plaintiff,

- against -

1809 EMMONS AVENUE DEVELOPMENT LLC,

Defendant,

----------x

Decision and order

Index No. 511382/18 MS ~~MS 1~~ 182

October 9, 2018

PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking to dismiss the complaint on various grounds pursuant to CPLR §3211. In addition, the defendant has moved seeking an injunction requiring the plaintiff to take certain action. The plaintiff opposes the motion and has cross moved seeking various reliefs. The defendant opposes that motion. Papers were submitted by both parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Background

The plaintiff tenant and defendant landlord entered into a lease agreement concerning property located at 1809 Emmons Avenue in Kings County. Specifically, the plaintiff utilized the space for a restaurant which had both indoor and outdoor space. The defendant asserts the plaintiff violated the lease by placing outdoor seating in certain areas where no such seating is permitted by the New York City Department of Buildings and the City Planning Commission. The defendant notified the plaintiff

of such lease violations and sought to terminate the lease. The plaintiff instituted the within lawsuit alleging the defendant breached the lease and committed fraud in the execution of the lease. The defendant moved seeking to dismiss the complaint.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the plaintiff can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

The defendant argues the lease agreement expressly delineates the outdoor space available to the plaintiff and that any additional space violates the consent of the Planning Commission and is hence in violation of the lease. Although the original lease does state that the tenant shall "comply with all laws" (Article 9 of lease dated September 15, 2016) there is no specific reference in the lease concerning the precise contours of the tenants outdoor seating area. An amendment to the lease agreement was signed by the parties on April 26, 2017. Article 6 of that amendment states that "tenant shall have exclusive

control over the outside area directly adjacent to the Demised Premises, specifically as set forth in Exhibit A…said outside area being indicated by blue shading" (see, Amendment to the Lease Agreement). Article 6 further states that the tenant shall comply "with all applicable New York City and State laws and regulations, condominium board rules and regulation and any and all Tenant's obligations as set forth in the Lease Agreement" (id). Indeed, Exhibit A as noted does include a blue shaded area which presumably consists of the outside area to which the tenant has exclusive control. A notation on the Exhibit A legend states that "open-space adjacent to the indoor restourant [sic] must ocupiy [sic] only by moveable seating and tables. Must comply to private public plaza regulations as perpermited [sic] by NYC City Planinig [sic] Commissioner" (id). Thus, the only limitation upon tenant's outdoor seating area is not contained in any agreement itself but in an exhibit describing the area. Thus, even if that legend is binding upon the tenant, surely a question of fact, the defendant has further not presented any evidence the existence of the additional seating area as alleged violates the City Planning Commission. The defendant did submit as Exhibit G to the Order to Show Cause information from the Planning Commission, however, the defendant did not pinpoint within the voluminous submission the precise statement from the Planning Commission that such arrangement established by the tenant

consisted of a violation. The information submitted in reply containing further allegations of violations merely highlights the factual disputes noted and does not conclusively demonstrate the dismissal of the lawsuit.

Furthermore, the tenant has presented evidence that the landlord assisted the tenant in removing the planters from the area to enable additional tables to be placed there. Thus, the defendant's allegation the existence of the outdoor seating area violates the lease is belied by assertions the defendant likewise acquiesced to the current situation. Of course, the defendant can dispute those assertions, however, at this juncture, before any discovery has taken place and considering the allegations of the complaint which must be deemed true, the motion seeking to dismiss the complaint is denied.

The next issue that must be addressed is whether the fraud claim is duplicative of the breach of contract claim. The breach of contract claim essentially alleges that the landlord breached the contract by denying unobstructed use of the outdoor seating area. Thus, if true, the failure to deliver such area constituted a breach of contract. The fraud claim alleges landlord induced the plaintiff to enter into the contract with the representation of such outdoor seating area. It is true that a misrepresentation of a material fact that is collateral to the contract which induces the other party to enter into the contract is sufficient to sustain

an action of fraud and is distinct from the breach of contract claim (Selinger Enterprises Inc., v. Cassuto, 50 AD3d 766, 860 NYS2d 533 [2d Dept., 2008]). However, where the misrepresentation refers only to the intent or ability to perform under the contract then such misrepresentation is duplicative of the breach of contract claim (see, Gorman v. Fowkes, 97 AD3d 726, 949 NYS2d 96 [2d Dept., 2012]). Generally, for a fraud claim to be collateral to a breach of contract claim the misrepresentation must consist of a present fact that is unrelated to the precise terms of the contract itself. Thus, in American Media Inc., v. Bainbridge & Knight Laboratories LLC, 135 AD3d 477, 22 NYS3d 437 [1st Dept., 2016] the plaintiff sued defendant for advertisements it placed in various periodicals without receiving payment pursuant to the contract. The court held misrepresentations made by the defendant were not duplicative of the breach of contract claim. Specifically, the principal of the defendant made statements that he loaned the defendant sufficient funds to cover the advertising expenses thereby inducing the plaintiff to enter into the contract. The court noted those misrepresentations were collateral since they were misrepresentations of present facts, namely that the defendant had sufficient funds. Further, these misrepresentations were collateral to the actual terms of the contract which involved placing advertising in plaintiff's periodicals (see, also, Deerfield Communications Corp., v.

Chesebrough Ponds Inc., 68 NY2d 954, 510 NYS2d 88 [1986]). Thus, the critical distinction whether a fraud claim is distinct from a breach of contract claim rests upon the following criteria. The first is whether the misrepresentation concerns a future intent to perform or whether the statement misrepresents present facts (see, Wylie Inc., v. ITT Corp., 130 AD3d 438, 13 NYS3d 375 [1st Dept., 2015]). If the misrepresentation concerns present facts it will generally be considered collateral. If the misrepresentation concerns a future intent to perform then it is generally duplicative of a breach of contract claim. This does not mean to imply a fraud claim regarding future conduct can never be distinct from a breach of contract claim. It surely can where the promise is collateral to the contract (see, Fairway Prime Estate Management LLC v. First American International Bank, 99 AD3d 554, 952 NYS2d 524 [1st Dept., 2012]). Moreover, even if the misrepresentation concerns a present statement of facts, those facts must touch a matter that is not the subject of the contract. Therefore, if the promise or misrepresentations "concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract" (HSH Nordbank AG v. UBS AG, 95 AD3d 185, 941 NYS2d 59 [1st Dept., 2012]).

In this case, the fraud claim alleges that "to induce Plaintiff to execute the subject lease, Sergey Rybak (Defendant's Managing Member) represented to Plaintiff in September, 2016 that

Plaintiff would have unobstructed use of the Outdoor Seating Area" (see, Verified Complaint, ¶ 51). While that may allege a present statement of facts, such allegation does not include a matter not already subject to the contract. Thus, any misrepresentations of defendant upon which the plaintiff relied in this case were all related to the agreement between the parties which forms the basis of the breach of contract claim.

Therefore, the fraud claim is duplicative of the breach of contract claim and consequently the motion seeking to dismiss the fraud claim is granted.

Concerning the defendant's motion seeking a preliminary injunction requiring the plaintiff to remove any tables and furniture in the disputed outdoor area such motion is denied. As noted, there are factual questions concerning the precise nature of the prohibition regarding the outdoor seating alleged by the defendant and there are further questions whether in any event such prohibition was binding on the plaintiff. Consequently, an injunction is improper.

Turning to the plaintiff's motion seeking an injunction ordering the defendant to make necessary repairs to exhaust pipes and to construct a pathway for engineers to maintain access to maintain such exhaust pipes, it is well settled that to obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits, (2) an irreparable injury

absent the injunction; and (3) a balancing of the equities in its favor (Volunteer Fire Association of Tappan, Inc., v. County of Rockland, 60 AD3d 666, 883 NYS2d 706 [2d Dept., 2009]).

Pursuant to the lease the landlord is required to maintain "the Building Systems located outside the Premises in working order and repair" (see, Lease, Article 12.3). Article 1 of the lease defines 'building systems' as "plumbing, heating, ventilating, air conditioning, elevator, wiring and electrical systems, installations, and facilities to the building" (id). Article 12.1 of the lease states that unless the lease expressly specifies landlord, the tenant shall make all necessary repairs. Further, the tenant is required to perform all repairs "located in the premises or within the walls of the Premises" (id). Thus, clearly, the outdoor exhaust pipes and the access to such pipes are the sole responsibility of the landlord. The landlord argues that the "plain and unambiguous terms of the lease agreement make clear that any issue with the pipes, lines, ducts, wires, conduits or other portions of the Building Systems are the responsibility of the tenant, and that, as such, the tenant is responsible for undertaking repairs if an issue arises" (see, Affirmation in Opposition, ¶ 21). However, as noted the lease only imposes those duties upon the tenant concerning indoor repairs. Outdoor repairs are unequivocally the responsibility of the landlord. Therefore, the preliminary injunction sought by

the plaintiff seeking to make the landlord create access and to repair the exhaust pipe is granted.

So ordered.

ENTER:

DATED: October 9, 2018
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC