BPC5, LLC v Carozen Inc.
2019 NY Slip Op 31302(U)
May 6, 2019
Supreme Court, New York County
Docket Number: 657109/2017
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK**, *Justice* — **PART** **IAS MOTION 38EFM**

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BPC5, LLC,

Plaintiff,

- v -

CAROZEN INC., YUTA GOLOVENZITZ,

Defendants.

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INDEX NO. 657109/2017

MOTION DATE 3/14/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

Upon e-filed documents numbered 6 through 32, it is ordered that plaintiff's motion for summary judgment on its complaint, and dismissing affirmative defenses and counterclaims, is denied, in accord with the following memorandum.

Plaintiff is a sublessor of commercial space on the fifth floor of the building known as 265 West 37th Street, New York, New York, located within Manhattan's garment district. Defendant Carozen Inc. is the sublessee, and defendant Yuta Golovenzitz (sublessee's principal) is the guarantor of sublessee's rent obligations. Said circumstances are pursuant to a written sublease dated December 1, 2016, bearing an expiration dated of December 1, 2021 (*see*, Moving Aff. Ex. 2 [NYSCEF Doc. No. 10). The sublease fixes rent, over the course of the five-year term, at increasing figures – all within a thirty-plus-thousand-dollar range per annum.

Defendants vacated early – six or so months after entering into the five-year sublease – asserting reasons reflected in its affirmative defenses and counterclaims, including: (i) mutual consent, as assertedly indicated by defendants' turning over of the keys and physical vacatur of the premises; (ii) allegedly intolerable lack-of ventilation conditions, exacerbated, allegedly, by plaintiff's unauthorized acts to prevent defendants from leaving their door open to allow for *some* air flow into the otherwise hermetically sealed premises; (iii) plaintiff's alleged refusal to

allow merchants from transporting goods to defendants by way of wheeled platforms, a/k/a dollies, requiring prohibitive transport of heavy boxes of goods by hand; and (iv) plaintiff's alleged unauthorized attempts to restrict defendants' business dealings to only certain classes of individuals. (*See*, Answer [NYSCEF Doc. No. 3].)

Plaintiff, who bears the heavy summary judgment burden on its within motion (*e.g., Zuckerman v City of N.Y.*,[1980]), actually mitigated overwhelming amounts of possible loss-of-rent (due to defendants' allegedly unauthorized early vacatur) by reletting the space to another sublessee a mere three months after defendants' vacatur of the premises (*see*, replacement sublease [NYSCEF Doc. No. 19]). In addition to the relatively quick reletting, the new sublease fixed rents at substantially higher ranges, ranging from $92,500.00 per annum to $102,103.00 per annum (*id.*). In this action, the complaint asks for a judgment that would encompass the entire duration of defendants' term, through 2021, in an amount recited as $150,387.00, despite the aforementioned mitigation of the overwhelming bulk of such rent facilitated by the substantially higher rent benefit of the new sublease (*see*, Complaint [NYSCEF Doc. No. 1]). Although plaintiff's motion itself seeks a sum of $23,991.99 for rent accrual during the gap between the vacatur and replacement sublet (Moving Aff. [NYSCEF Doc. No. 8] ¶ 19).

Plaintiff tries to discount defendants' assertion of intolerable ventilation conditions by pointing to the "as is" clause of the sublease (Sublease ¶ 2 [NYSCEF Doc. No. 10]). However, plaintiff does nothing to square that position with another clause of the sublease, titled "Quiet Enjoyment," which provides in pertinent part that "Subtenant shall peaceably and quietly have, hold and enjoy the Space during the term hereof without molestation or hindrance by Sublandlord . . . ." (*Id.*, ¶ 8.) While it is true that defendants took the space "as is," it is not necessarily true that such taking precludes defendants from asserting, reasonably, as a trier of

fact might find, that a prevention by the plaintiff of defendants' ability to keep their door open constitutes a violation of the covenant of quiet enjoyment of the leasehold. That is especially so in the absence of any provision in the sublease empowering plaintiff to place such a restriction on defendants (*see, id., passim*). In a similar vein, while the sublease exempts plaintiff from furnishing a ventilation system (Sublease ¶ 10), that, too, does not vitiate the possibility that a trier of fact might conclude that restricting defendants' freedom to leave their door open would constitute a patent breach of the Quiet Enjoyment covenant found in the sublease. Indeed, paragraph 12 of the sublease, titled "Alterations," mentions nothing about a restriction on the defendants' freedom to keep their door open.

Furthermore, paragraph 20 (G) of the sublease exempts plaintiff from any <u>inability</u> it might encounter in performing its contractual duties, beyond its control. But it does not exempt plaintiff from any <u>unwillingness</u> it might harbor, in performing its contractual duties, which most definitely include a duty to afford defendants the freedom to exercise quiet enjoyment of the space "without molestation or hindrance by Sublandlord." Again – whether or not defendants can show that they were hindered in their freedom to facilitate natural air flow, and whether such hindrance is important enough to be characterized as a breach of quiet enjoyment, should be a matter for the trier of fact to consider and determine. It ought not be determined on paper submissions alone (*see, 34-35th Corp. v 1-10 Indus. Assocs., LLC*, 16 AD3d 579, 580 [2d Dept 2005] [whether or not particular actions or omissions by a commercial landlord rise to the level of breach of the covenant of quiet enjoyment is "a triable issue of fact for the jury to determine"]). And that is especially so in the face of the open controversy among the parties on whether such open-door-related restriction ever occurred (compare Golovenzitz Aff. [NYSCEF Doc. No. 22] ¶ 5 with Baker Aff. [NYSCEF Doc. No. 8] ¶ 16).

Plaintiff also says nothing about whether its alleged prohibition against merchandise dolly use may or may not constitute a breach of the covenant of quiet enjoyment vis-à-vis this commercial space that was anticipated for use as a garment center workplace (*see*, Golovenzitz Aff. [NYSCEF Doc. No. 22] ¶¶ 3, 6). This, too, is an issue that should be considered by the trier of fact, as it bears on whether the asserted prohibition constitutes a breach of the quiet enjoyment covenant within the factual context of this case.

Issues of fact also exist with regard to whether defendants vacated of their own accord, or at the behest of the plaintiff (*compare* Golovenzitz Aff. [NYSCEF Doc. No. 22] ¶ 7 *with* Baker Aff. [NYSCEF Doc. No. 8] ¶ 12). Indeed, overall comparison of the entireties of the moving and opposing fact witness affidavits (from Ms. Golovenzitz and from Mr. Baker, respectively) reveals controversies of fact regarding each and every one of defendants' assertions which – as only a trier of fact can determine – may or may not constitute breaches of plaintiff's absolute contractual duty to allow defendants reasonable capacity to enjoy this commercial space, consonant with its mutually anticipated use as a garment center workplace.

In an action where there is an assertion of breach of the covenant of quiet enjoyment of a commercial leasehold, "a tenant must show actual or constructive eviction" (*34-35th Corp., supra*). As the Court of Appeals has declared:

> The general rules concerning breach of covenants of quiet enjoyment are quite clear. Whether the breach of the covenant is alleged as a defense to an action for rent due, or is used as a basis for an action for damages, the determining factor, with few exceptions, is whether the tenant has vacated the premises.

(*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 120, *rearg denied* 4 NY2d 1046 [1958]). Here, there is no question that defendants vacated the premises – and within six months or so into the five-year term, no less. Thus, defendants, at a bare minimum, have set the stage for an assertion of defense grounded in breach of the covenant of quiet enjoyment. Moreover, a

condition precedent to such a defense is the tenant's payment of rent up to the time of its vacatur (*see, Dave Herstein Co., supra*, at 120-21). Defendants in the instant case did so, and that is why the instant motion seeks a judgment for rent accruing only subsequent to defendants' vacatur of the premises on quiet enjoyment breach grounds. As noted above, whether or not the circumstances alleged rise to the level of legally cognizable breach of the covenant must be a matter for the ultimate trier of fact to determine (*see,* 34-35th Corp., *supra*).

In view of the issues of fact presented by the conflicting submissions of the parties, summary judgment is impossible at this time.

Accordingly, it is

ORDFERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that counsel for the parties will appear for a preliminary conference at Part 38 of this court, located at 111 Centre Street, Room 1166, New York, New York, on May 23, 2019, at 2:15 p.m.

ENTER:

Louis L. Nock

5/6/2019
DATE

LOUIS L. NOCK, J.S.C.

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