Brand Brand Nomberg & Rosenbaum, LLP v Cohen
2019 NY Slip Op 32491(U)
August 21, 2019
Supreme Court, New York County
Docket Number: 657447/2017
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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BRAND BRAND NOMBERG & ROSENBAUM, LLP,

Plaintiff,

- v -

CHARLES COHEN, COHEN BROTHERS REALTY CORPORATION, 622 THIRD AVENUE COMPANY, LLC, And 622 THIRD MANAGEMENT CORP,

Defendants.

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INDEX NO. 657447/2017

MOTION DATE 05/08/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 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

were read on this motion to STRIKE AFFIRMATIVE DEFENSES.

Brand Brand Nomberg & Rosenbaum, LLP, New York (Brett J. Nomberg), for plaintiff.
Harwood Reiff, LLC, New York (Donald A. Harwood, Simon W. Reiff), for defendants.

Gerald Lebovits, J.

This case arises from a dispute between a law firm, plaintiff Brand Brand Nomberg & Rosenbaum, LLP, and its landlord, defendant 622 Third Management Corp. (622 Third).

Background

In April 2017, plaintiff entered into a commercial lease with 622 Third for office space on the seventh floor of 622 Third Avenue in New York County. It is undisputed that when the lease was signed, the seventh floor still required substantial construction work to be usable by 622 Third's tenants, including plaintiff.

Plaintiff moved into the leased premises at the end of July 2017. Plaintiff alleges 622 Third failed timely to complete necessary work on areas of the seventh floor adjoining the leased premises. In particular, 622 Third allegedly failed to construct usable bathrooms until November 28, 2017, forcing plaintiff's partners and staff to use bathrooms on other floors. Plaintiff also alleges that 622 Third had failed to complete work on shared hallways and the elevator bank on the seventh floor even by the time plaintiff filed its complaint in this action.

Plaintiff sued for damages arising out of these construction-related issues. As relevant here, 622 Third moved to dismiss on two principal grounds: that (i) the action should be dismissed under CPLR 3211 (a) (7) because plaintiff's complaint failed to state a cause of action;

dismissed under CPLR 3211 (a) (7) because plaintiff's complaint failed to state a cause of action; and (ii) the action should be dismissed under CPLR 3211 (a) (1) because claims were barred by a limitation-of-liability provision in article 4 of the lease between plaintiff and 622 Third. This court denied the motion in an oral ruling on the record and a subsequent written decision, rejecting each of defendant's grounds for dismissal. (*See* NYSCEF No. 35 at 2-6 [transcript of oral ruling]; NYSCEF No. 25 [written decision].)

622 Third answered the complaint, raising eight affirmative defenses.[1] Plaintiff now moves to dismiss each of the affirmative defenses, and seeks the costs of the motion on the ground that several of the defenses are frivolous. Plaintiff also moves to strike 622 Third's answer in its entirety for failure to comply with discovery orders. Plaintiff's motion to dismiss affirmative defenses is granted in part and denied in part, and its sanctions motion is denied. Plaintiff's motion to strike the answer is denied.

A. The Branch of Plaintiff's Motion to Strike 622 Third's Affirmative Defenses

A party may move under CPLR 3211 (b) to dismiss one or more affirmative defenses "on the ground that a defense is not stated or has no merit." The movant "bears the burden of demonstrating that the defenses are without merit as a matter of law." (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 541 [1st Dept 2011].) The movant may satisfy this burden by showing that affirmative defenses "either do not apply under the factual circumstances of [the] case, or fail to state a defense." (*Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC,* 78 AD3d 746, 748 [2d Dept, 2010].) If, however, "there is any doubt as to the availability of a defense, it should not be dismissed." (*Warwick v Cruz*, 270 AD2d 255, 255 [2d Dept 2000].)

In this case, 622 Third already raised several of its affirmative defenses unsuccessfully in its pre-answer motion to dismiss. Those affirmative defenses must be dismissed as a matter of law of the case. (*See GG Managers, Inc. v Fidata Trust Co. New York*, 215 AD2d 241, 241 [1st Dept 1995].)

In particular, the first affirmative defense (failure to state a claim), sixth affirmative defense (documentary evidence), seventh affirmative defense (claims barred by the lease), and ninth affirmative defense (claims cut off by plaintiff taking possession) do no more than repeat arguments that this court already rejected in denying 622 Third's motion to dismiss. Plaintiff's motion to strike those affirmative defenses is granted.[2]

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[1] The affirmative defenses in the answer are numbered one to nine, but the list appears inadvertently to have skipped defense number five, so only eight defenses have been raised. (*See* NYSCEF No. 24, at 5-6.) For simplicity, this order refers to the affirmative defenses as denominated in the answer.

[2] 622 Third correctly notes that a defendant's answer may properly raise an affirmative defense that plaintiff has failed to state a cause of action. (*See Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 351-352 [1st Dept 1977]; *accord Butler v. Catinella*, 58 AD3d 145, 148 [2d Dept 2008].) Here, however, 622 Third raised that defense only *after* this court had already concluded that plaintiff's complaint stated a claim. The defense is thus foreclosed by this court's prior ruling.

The eighth affirmative defense asserts that certain provisions of the lease bar plaintiff's claims regarding the seventh-floor bathroom and hallways outside plaintiff's leased office space. This defense raises documentary-evidence arguments beyond those asserted in defendant's pre-answer motion to dismiss under CPLR 3211 (a) (1), which relied principally on a lease provision and related documents about plaintiff taking possession of the leased office itself. But 622 Third plainly had knowledge of the lease provisions relied upon in the eighth affirmative defense when it moved to dismiss; those provisions should have been raised in that motion as well. 622 Third's knowing (or inadvertent) failure to do so does not entitle it to try again now that the motion to dismiss has been denied. (*See Lee v Chun Ka Luk*, 127 AD3d 612, 613 [1st Dept 2015].) Plaintiff's motion to strike the eighth affirmative defense is granted.

Plaintiff's motion to strike the second affirmative defense also is granted. 622 Third's answer does not allege—and 622 Third's motion papers do not identify—any wrongdoing by plaintiff at all, much less explain how any such wrongdoing might have contributed to plaintiff's alleged injuries. Similarly, plaintiff's motion to strike the fourth affirmative defense is granted to the extent of striking the defenses of laches and unclean hands. 622 Third has not alleged or argued how these doctrines might apply here. The reference to these doctrines in the answer consists instead merely of a bare legal conclusion, which is not enough. (*See Commissioners of State Ins. Fund v. Ramos*. 63 A.D.3D 453, 453 [1st Dept 2009].)

Plaintiff's motion to strike the third affirmative defense is denied. The extant factual record undisputedly reflects that delays occurred in building out usable office space on the seventh floor of the building (both inside and outside plaintiff's leased office space). That record also leaves open the possibility that the undisputed delays in construction on the seventh floor (both inside and outside plaintiff's leased office space) were caused by actions of other parties outside 622 Third's control. Plaintiff has not established as a matter of law that this affirmative defense is meritless.

Plaintiff's motion to strike 622 Third's assertion of waiver and estoppel in the fourth affirmative defense also is denied. 622 Third has introduced at least some evidence that may suggest plaintiff was aware of, and acquiesced to, shortcomings of the seventh-floor environment that underlie plaintiff's claims for damages.

Plaintiff argues that these defenses are foreclosed by merger and no-representations clauses in the lease. The merger clause in the lease, however, states only that (i) it is the entire agreement between plaintiff and 622 Third as to the "Demised Premises," and (ii) "all *prior* negotiations and agreements are merged herein." (Lease, NYSCEF No. 7, at 57 (emphasis added).) Plaintiff's claims are based on injuries it allegedly suffered due to 622 Third's failure to complete shared space on the seventh floor that the lease itself specifies is *outside* the Demised Premises. (*See* Complaint, NYSCEF No. 1, at 5-7; NYSCEF No. 7, at 13-14.) And 622 Third's waiver and estoppel claims appear to rely on plaintiff's knowledge and statements from *after* the lease was executed, not before. Similarly, the no-representations clause states that 622 Third did not make "any representation whatsoever with respect to *the Demised Premises* except as expressly set forth in the lease." (NYSCEF No. 7, at 58.) That clause does not on its face address

the issue of representations regarding shared space on the seventh floor outside plaintiff's leased office space.

This is not to say, of course, that 622 Third's waiver and estoppel defenses will necessarily prove meritorious—merely that at this stage of the action plaintiff has not established that these defenses should be stricken from the answer.

B. The Branch of Plaintiff's Motion for Sanctions

Plaintiff asks this court to award sanctions under 22 NYCRR part 130 because several of the affirmative defenses in 622 Third's answer were frivolous. Plaintiff's sanctions request is denied. While it is true that certain of the affirmative defenses in the answer plainly were foreclosed by this court's denial of 622 Third's motion to dismiss, other defenses presented closer questions; and, as discussed above, several affirmative defenses survive. This court cannot say that any limited additional effort incurred by plaintiffs in responding briefly to plainly meritless affirmative defenses would warrant the imposition of sanctions.

C. The Branch of Plaintiff's Motion to Strike 622 Third's Answer

Plaintiff also asks this court to strike 622 Third's answer altogether for failure to provide certain discovery demanded by plaintiff. This court does not agree that any such failure warrants the stern discovery sanction of striking the answer. Additionally, the court issued a compliance-conference order after briefing on this motion, directing 622 Third to provide specified items of discovery (including much of the material referred to plaintiff's request to strike) within 45 days. (*See* NYSCEF No. 56.) The record does not reflect the extent to which 622 Third has complied with this order (or whether any failure to comply has been acquiesced in by plaintiff). This court therefore directs that to the extent not already provided, 622 Third shall provide plaintiff the discovery referenced in the compliance-conference order dated May 1, 2019, within 30 days of service of this order with notice of entry.

Accordingly, it is

ORDERED that the branch of plaintiff's motion to strike 622 Third's affirmative defenses is granted to the extent of striking the first, second, sixth, seventh, eighth, and ninth affirmative defenses in full; and striking the fourth affirmative defense's assertion of the defenses of laches and unclean hands; and it is further

ORDERED that the branch of plaintiff's motion to strike the affirmative defenses is denied as to 622 Third's third affirmative defense in its entirety; and denied as to the fourth affirmative defense's assertion of the defenses of waiver and estoppel; and it is further

ORDERED that the branch of plaintiff's motion for sanctions under 22 NYCRR part 130 is denied; and it is further

ORDERED that the branch of plaintiff's motion to strike the answer for failure to provide discovery is granted only to the extent that 622 Third is directed to turn over the discovery

described in this court's conference order dated May 1, 2019, to the extent not already provided, within 30 days of service of a copy of this order with notice of its entry; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry on defendant within 7 days.

8/21/2019
DATE

GERALD LEBOVITS, J.S.C.

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