255 Butler Assoc. LLC v 255 Butler LLC
2019 NY Slip Op 33173(U)
October 9, 2019
Supreme Court, Kings County
Docket Number: 511560/15
Judge: Sylvia G. Ash
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At an IAS Term, Part Comm 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of October, 2019.

PRESENT:

HON. SYLVIA G. ASH,

Justice.

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255 BUTLER ASSOCIATES LLC,

Plaintiff,

- against -

Index No. 511560/15

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255 BUTLER LLC, ARIEL AKKAD a/k/a ARIEL ACCAD, NATHAN AKKAD a/k/a NATHAN ACCAD, SOLOMON AKKAD a/k/a SOLOMON ACCAD and BENJAMIN AKKAD a/k/a BENJAMIN ACCAD,

Defendants.

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The following papers numbered 1 to 14 read herein:	Papers Numbered	
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-5	6-10
Opposing Affidavits (Affirmations)	7-10	11-13
Reply Affidavits (Affirmations)	11-13	14

Upon the foregoing papers in this commercial landlord/tenant dispute, plaintiff 255 Butler Associates LLC (Tenant) moves (in motion sequence 20) for an order, pursuant to CPLR 3212, granting it partial summary judgment: (1) on its first cause of action against defendant 255 Butler, LLC (Landlord) for a judgment declaring that no event of default exists under the commercial lease, as alleged in Landlord's July 27, 2015 notice to cure or Landlord's September

11, 2015 notice of termination, and (2) dismissing Landlord's first and third affirmative defenses.

Defendant Landlord cross-moves (in motion sequence 21) for an order, pursuant to CPLR 3212, granting it summary judgment on the first cause of action, and granting it a judgment declaring that Tenant was in default under the lease when it served its July 27, 2015 notice to cure and its September 11, 2015 notice of termination.

Background

The Lease

On March 22, 2013, Landlord entered into a 49-year,[1] triple-net, commercial lease (Lease) with Tenant regarding Landlord's property at 255 Butler Street, also known as 484 Baltic Street and 224 Nevins Street, in Brooklyn (Property).

Article 11 of the Lease, entitled "Conversion of Building," provides that Tenant "shall diligently pursue (subject to Unavoidable Delays) the Project in accordance with the Design Guidelines[,]" which involved the Tenant's conversion of the warehouse located on the Property "initially into a multi unit commercial property, which may include a hotel, and subsequently at Tenant's election, into commercial, retail, residential, hotel or any other legal use" (Project).[2] Under Article 11 of the Lease, Tenant was required "[a]s soon as practicable" to obtain "all permits, consents, certificates and approvals required to commence the Project" and submit the design development plans, specifications, applications and final construction plans and

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[1] The initial term of the Lease is 49 years with two additional 10-year options.

[2] *See* definition of "Design Guidelines" in Article 1 of Lease.

specifications to the Landlord "for its review and for informational purposes only." Notably, the Lease contains no construction milestones, deadlines or timetables for the Project.

Article 10 of the Lease addresses the "Assignment, Subletting, Mortgages, Etc." of the Property. Regarding Tenant's transfers of interests in the Lease prior to "Substantial Completion" of the Project, Section 10.1 (a) of the Lease provides, in relevant part:

> "Notwithstanding the foregoing [restrictions on transfers or subletting], (I) the following transfers *shall be permitted without Landlord's consent* being required therefor prior to Substantial Completion of the Building: (1) the transfer of a direct or indirect interest in Tenant . . . (2) *subleases* in the normal course in anticipation of Substantial Completion of the Building or (3) the collateral assignment to a Leasehold Mortgagee of Tenant's interest in subleases as security for a construction loan . . ." (emphasis added).

Landlord's Notice to Cure

Landlord, on July 27, 2015, served Tenant with a "Notice to Cure Lease Default" (Notice to Cure), alleging a number of defaults, including that Tenant failed to "diligently pursue" the planned conversion of the building located at the Property into a multi-unit commercial complex. Additionally, the Notice to Cure alleged that: (1) "Tenant is *contemplating* a sublet of the Building . . ." to WeWork Companies Inc. (WeWork) "without first seeking the consent of Landlord," and (2) "Tenant has failed to pay New York City property taxes for the Premises for the period beginning July 1, 2015 in the amount of $149,571.66" (emphasis added).

In the Notice to Cure, Landlord demanded that Tenant cure all violations of the Lease on or before September 1, 2015, and advised that if the defaults were not cured by that date, it would terminate the Lease.

Landlord's Notice of Termination

Landlord, on September 11, 2015, served Tenant with a "Notice of Termination of Tenancy" (Notice of Termination), which advised that Landlord "hereby elects to terminate the Lease effective **September 30, 2015** . . . based upon Tenant's failure to timely cure the defaults set forth in Landlord's Notice to Cure Lease." Importantly, the Notice of Termination expressly admits that "Tenant has paid New York City property taxes for the Premises . . ."

The Instant Action

On September 22, 2015, Tenant commenced this action against Landlord and its principals, the individual Akkad defendants,[3] and simultaneously moved, by order to show cause, for a Yellowstone Injunction.[4] Tenant was later granted leave to amend the verified complaint. The first cause of action in the amended verified complaint seeks a judgment declaring that Tenant did not default under the Lease (amended complaint at ¶¶ 162-168).

The amended complaint alleges that "Tenant has been diligently pursuing the conversion of the Building into a multi-unit commercial property at all times since entering into the Lease" and "has spent over $13 million in connection with its diligent pursuit of converting the building . . ." (*id.* at ¶¶ 37 and 1). The amended complaint alleges that "[a]fter executing the lease with

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[3] The individual Akkad defendants are allegedly "member[s] of Landlord and responsible for its management" (*id.* at ¶¶ 13-16).

[4] By an April 20, 2016 order, this court granted Tenant's motion for a Yellowstone injunction, which was affirmed on appeal (*see 255 Butler Associates, LLC v 255 Butler, LLC*, 173 AD3d 649 [2019]). By a September 12, 2018 order, this court denied Landlord's motion to vacate the Yellowstone injunction.

Landlord, Tenant immediately began diligently pursuing its redevelopment of the building, first as a hotel but then as a shared office space concept pursuant to a *potential* long term sublease of the entire building with WeWork . . ." (*id.* at ¶ 2 [emphasis added]). The amended complaint further alleges that "[s]hortly after Tenant advised Landlord about the *potential* WeWork sublease transaction, Landlord served a purported notice to cure . . . containing three manufactured 'events of default' as a pretext to take over Tenant's lucrative WeWork deal. . ." (*id.* at ¶ 3 [emphasis added]).

On February 28, 2018, Landlord and the individual Akkad defendants collectively answered the amended complaint, denied the material allegations therein and asserted affirmative defenses. Landlord's first and third affirmative defenses asserted are that Tenant's "claims are barred by its material breaches of its obligations under the Net Lease" and that Tenant's "default in failing to diligently pursue the Project, as required under the Net Lease, is not curable" (answer to amended complaint at ¶¶ 50 and 52).

Tenant's Summary Judgment Motion

On February 14, 2019, after document discovery and party depositions were completed,[5] Tenant moved for partial summary judgment on its first cause of action for a judgment declaring that no event of default exists under the Lease, and dismissing Landlord's first and third affirmative defenses.

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[5] In April 2017, Tenant moved for summary judgment on the first cause of action, and Landlord opposed the motion based on the need for discovery, pursuant to CPLR 3212 (f). Tenant's prior summary judgment motion was denied with leave to renew after completion of discovery.

As a preliminary matter, Tenant asserts that the only "Event of Default" at issue on this motion is its alleged failure to diligently pursue the Project, since Landlord previously "waived, abandoned or withdrew" the other alleged defaults in the Notice to Cure regarding Tenant's purported failure to pay 2015 property taxes and Tenant's contemplated sublease with WeWork. In this regard, Tenant produces Landlord's Notice of Termination, in which Landlord admits that the taxes were paid. Tenant also references its April 2017 partial summary judgment motion in which it "addressed the sufficiency of each alleged default in the Pretextual Predicate Notices" and "Landlord opposed the motion only to the extent of addressing Tenant's 'diligent pursuit' of the Project." Further, Tenant notes that "[i]n response to [its] Rule 19-a Statement of Material Facts in June 2016, Landlord posed only one question: '[w]hether plaintiff diligently pursued the Project.'" Additionally, Tenant references Ariel Akkad's deposition, at which he admitted that Tenant had only a *draft* sublease with WeWork at the time that Landlord's Notice to Cure was served.

Tenant asserts that it established its prima facie right to partial summary judgment by "produc[ing] more than 16,000 documents demonstrating [its] diligent pursuit of the Project" and through the deposition testimony of Shmuel Boymelgreen (Boymelgreen), Tenant's sole officer and managing member. In addition to Boymelgreen's deposition transcript, Tenant submits Boymelgreen's affirmation in support of its partial summary judgment motion, in which he provides a detailed explanation how "Tenant has been and continues to be in full compliance with the terms and conditions of the Lease."

According to Boymelgreen, "Tenant has spent in excess of $18 million, including rent, use and occupancy, carrying costs, Impositions and Insurance, the fees of [a] myriad [of] consultants, and other costs and expenses to enforce its rights under the Lease . . ." Boymelgreen details the various steps taken by Tenant to determine the feasibility of converting the Property into a hotel, including the commission of a survey of the Property, the retention of a hospitality market consultant, the retention of an architect to perform massing studies and the retention of another consultant to generate a structural feasibility report. Boymelgreen affirms that "[w]ith these studies and reports in hand or in the works, on or about August 16, 2013, Tenant . . . submitted an application to DOB for [a] zoning resolution determination[,]" which was approved.

According to Boymelgreen, Tenant then retained an exclusive mortgage broker to secure financing for the Project, and retained consultants to perform an economic impact study and a detailed narrative appraisal, copies of which are included in the record. Boymelgreen affirms that, throughout the fall of 2013, "Tenant began a search for an architect[,] a hotel designer, structural engineer, mechanical engineer, and many other consultants and engineers needed to develop plans for a hotel." Boymelgreen affirms that in December 2013, Tenant hired a hospitality market consultant "to conduct a comprehensive search for a hotel operator" and in March 2014, Tenant executed agreements to retain a primary architect and designer to work on the Design Phase of the Project, copies of which are included in the record. Boymelgreen also affirms that, in May 2014, Tenant filed Job #320812377 with DOB "seeking approval to perform

demolition, including removal of partitions, plumbing and mechanical fixtures, as well as approval for structural work on existing structures[,]" and that DOB subsequently issued a permit on October 3, 2014. Boymelgreen details additional DOB submissions throughout 2014.

Boymelgreen further affirms that "[w]hile Tenant's pursuit of a hotel concept was diligently moving forward, Tenant was informed by its mortgage broker that no lender was willing to finance construction of a high end hotel in the Gowanus area of Brooklyn . . ." Boymelgreen affirms that "[i]n or about March 2015, Tenant's employee was approached by senior representatives at WeWork who expressed an interest in opening a facility in Brooklyn, and in seeing the Building." Boymelgreen explained that "WeWork's interest provided Tenant with a timely opportunity to change from the original hotel conversion plan and avoid a potential stall in the Project due to a lack of financing" and WeWork was interested in "repurpos[ing] much of the design that had already been developed." Boymelgreen described how Tenant "determined that a conversion for primary use as a WeWork location would be a sound approach [and] worked quickly to modify the Project."

Boymelgreen affirms that he contacted Ariel Akkad in early July 2015 to inform him that Tenant had changed the Project into a shared office space concept, and that WeWork was interested in a sublease. Boymelgreen also affirms that on July 22, 2015, Tenant provided Landlord's counsel with a *draft* copy of the *proposed* WeWork sublease at Landlord's request. Five days later, on July 27, 2015, Landlord responded by serving Tenant with the Notice to Cure.

Landlord's Opposition and Summary Judgment Cross Motion

Landlord opposes Tenant's partial summary judgment motion, and cross-moves for partial summary judgment granting it a declaration in its favor on Tenant's first cause of action. According to Landlord's manager, Ariel Akkad, the record confirms that "Tenant was in default on a number of its obligations under the Lease at the time the Notice of Cure was served on July 27, 2015; and that those defaults continued to exist on September 11, 2015, when the Notice of Termination was served." In his affidavit, Akkad explains that "during the approximately two and one half year period between the signing of the Lease and the transmittal of the Notice to Cure, the Tenant *had not engaged in any actual construction* of any 'Project' . . ." and "[i]nstead, *after pursuing the development* of a Hotel Project for approximately two years, sometime in 2015 the Tenant . . . elected to 'pivot' to an alternative plan under which Tenant would sublease the entire Property to WeWork . . ." (emphasis added).

Akkad admits that "Tenant appears to have hired many consultants and obtained many studies about a Hotel[,]" yet complains that "Tenant appears never to have considered whether the Hotel idea could attract investors or financing" and "Tenant never actually hammered a single nail into the Property." Essentially, Akkad argues that "merely commissioning studies without doing any actual construction is not the 'diligent pursuit' of the Project" and "had the Tenant 'diligently pursued,' construction would certainly have begun before the Notice to Cure was served . . ." While Akkad expressly concedes that the Lease contained no construction deadlines, he asserts that "where, as here, there is no specific time set for the performance of an

act (in this case the completion of the development of the Project) the law will imply a reasonable time for such performance under all of the circumstances." Landlord asserts that "at the very least, there are material issues of fact which preclude summary judgment in favor of the Tenant, including whether the Tenant 'diligently pursued' the development of the Project . . ."

Tenant's Reply

Tenant, in reply, asserts that "Landlord has admitted everything Tenant did to diligently pursue the Project from prior to Lease Commencement on May 6, 2013, through July 27, 2015" and "[t]he record is undisputed that Tenant steadily and energetically pursued the Project during this entire period . . ." Tenant notes that the phrase "diligently pursue" is not defined in the Lease, and asserts that "this Court can and should use the ordinary dictionary definition of the word 'diligent,' which is not temporal in nature." Tenant argues that the Lease is clear and unambiguous, the court may not "rewrite the Lease by imposing a reasonable time for Tenant to Commence Construction or have Final Plans" and "[t]he Court should therefore decline Landlord's invitation to modify the Lease under the guise of judicial interpretation."

In addition, Tenant argues that Landlord admitted in its "Rule 19-a Statement of Disputed and Undisputed Facts" that from "May 6, 2013 through July 27, 2015 Tenant was working steadily in furtherance of the Project by first developing a hotel and then an office building." Tenant asserts that Landlord has failed to challenge "any of the specific documents attached to the moving papers corroborating Tenant's activities . . ." Tenant further argues that shifting the nature of the Project from a hotel to a multi-use office building was not a breach of the Lease

because "[t]he Lease expressly permits Tenant to choose any type of multi-unit commercial property it desires to build."

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of

material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). If there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

Here, Tenant has demonstrated its prima facie right to summary judgment on its first cause of action for a judgment declaring that no event of default exists under the parties' Lease. Essentially, the Landlord's Notice to Cure identified three categories of alleged defaults, two of which are not sustainable. Landlord explicitly stated in its Notice of Termination that Tenant had paid the property taxes, and therefore, any such default by Tenant was admittedly cured. Additionally, Landlord admitted that Tenant's *contemplated* sublease to WeWork was never consummated, and thus, the draft WEWork sublease cannot constitute an event of default. Therefore, the only issue raised on this summary judgment motion and cross motion is whether Tenant breached Article 11 of the Lease by failing to "diligently pursue" the conversion of the building into a multi-unit complex.

Tenant produced uncontroverted testimonial evidence and voluminous documentary evidence demonstrating that it complied with its obligation under the Lease to "diligently pursue" the Project by, among other things: (1) commissioning a survey of the Property; (2) retaining a hospitality market consultant to search for a hotel operator; (3) retaining an architect to perform massing studies; (4) retaining a consultant to generate a structural feasibility report; (5) retaining an exclusive mortgage broker to secure financing for the Project; (6) retaining consultants to perform an economic impact study and a detailed narrative appraisal; and (7)

executing agreements to retain a primary architect and designer to work on the Design Phase of the Project. In addition, Tenant evidenced its many filings with the DOB regarding the Project. While it is true that Tenant did not yet reach the construction phase of the Project, the record contains substantial evidence that Tenant nevertheless "diligently pursued" the Project. Landlord, in opposition, failed to raise any genuine issues of material fact which require a trial on the first cause of action. Accordingly, it is

ORDERED that the branch of Tenant's summary judgment motion seeking a judgment on its first cause of action for a declaratory judgment is granted; and it is further

ORDERED, ADJUDGED AND DECLARED that no event of default exists under the Lease, as alleged in Landlord's Notice to Cure or Landlord's Notice of Termination; and it is further

ORDERED that the branch of Tenant's summary judgment motion seeking to dismiss Landlord's first and third affirmative defenses is granted, and Landlord's first and third affirmative defenses are hereby dismissed; and it is further

ORDERED that Landlord's summary judgment cross motion is denied.

This constitutes the decision and order of the court.

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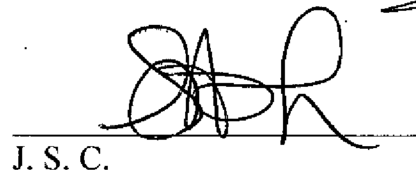

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