

New Cingular Wireless PCS, LLC v West Invs. LLC

2020 NY Slip Op 30262(U)

January 3, 2020

Supreme Court, New York County

Docket Number: 652926/2015

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREA MASLEY

PART IAS MOTION 48EFM

Justice

-----X

INDEX NO. 652926/2015

NEW CINGULAR WIRELESS PCS, LLC

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 003

- v -

WEST INVESTORS LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 97, 98, 99, 100, 103, 104, 105

were read on this motion to/for

SUMMARY JUDGMENT (AFTER JOINDER)

Masley, J.:

Plaintiff New Cingular Wireless PCS, LLC (Tenant) moves (1) pursuant to CPLR 3001 for a declaratory judgment (a) that Tenant may access the premises for all purposes stated in the 2010 lease (the Agreement) including for upgrades and (b) defendant West Investors LLC (Landlord) cannot impose restrictions or conditions on access that are not expressly stated in the Agreement including requiring advance scheduling, a description of the purposes for which access is sought, production of certificates of insurance, prior identification of all representatives who seek access, and the physical presence of Landlords' attorney when Tenant is at the premises performing work authorized by the Agreement; (2) pursuant to CPLR 3212 for summary judgment on its breach of contract claim based on which Tenant seeks a declaratory judgment as to improper restrictions on access and money damages; (3) judgment in Tenant's favor on Landlord's counterclaim for a declaratory judgment that Tenant "is not entitled to

access for the purpose of upgrading the facilities;" and (4) for attorneys' fees pursuant to the Agreement. (NYSCEF Doc. No. [NYSCEF] 65, the Agreement).

This is a 2015 action by Tenant at 21 West 58th Street, NYC (the Premises) against Landlord in which Tenant's claims include: (1) specific performance of the Agreement or permanent injunction allowing Tenant access to the premises to upgrade its equipment and (2) breach of contract for denying Tenant access to the Premises. The verified complaint, entitled "Verified Complaint for Injunctive and Declaratory Relief," seeks the following remedies: "1. granting a preliminary and permanent injunction and temporary restraining order against Defendant from precluding AT&T's access to the Premises or interfering with AT&T's permitted uses under the Agreement; 2. Issuing a declaratory judgment enforcing the validity of the Agreement; 3. Awarding AT&T all damages with respect to its claim for breach of contract in an amount in excess of \$500,000, together with appropriate interest thereon; 4. Granting AT&T its full costs of suit, including, as part of such costs, attorneys' fees."

In its September 11, 2015 answer, verified by an attorney, Landlord counterclaims for a declaratory judgment that Tenant is not entitled to access for the purpose of upgrading the facilities. (NYSCEF 78).

Summary judgment is a drastic remedy that will only be granted where the movant demonstrates that no genuine triable issue of material fact exists. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Initially, "the proponent of a summary judgment motion 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." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant

has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue of fact. (*Zuckerman*, 49 NY2d at 562).

The court heard argument on this motion on July 8, 2019 and resolved some issues on the record. The court rejected Landlord's baseless assertion of ambiguity precluding summary judgment. (NYSCEF 104). Rather, the Agreement could not be clearer. Section 2 of the Agreement specifically provides for "transmission and reception of communication signals and an installation, construction, maintenance, operation, repair, replacement, and upgrade of its communication fixtures and related equipment." (Emphasis added). Accordingly, the court was compelled to grant Tenant's motion for summary judgment. However, the court neglected to dismiss Landlords' counterclaim for a declaratory judgment. Implicit in this dismissal is that Tenant's request for the opposite declaratory judgment is granted—Section 2 of the Agreement allows Tenant access to the premises for all uses stated in Section 2 of the Agreement including upgrades.

On September 13, 2019, after consideration of Landlord's counter-order (NYSCEF 98), the court issued an order based on the argument (1) finding Sections 2 and 12 unambiguous as to Tenant's uses of the premises and time periods for such uses, respectively, and Landlord was directed to give Tenant such access consistent

with the Agreement;¹ (2) granting Tenant's summary judgment motion to dismiss Landlord's counterclaim for declaratory judgment;² (3) barring Landlord from imposing restrictions or conditions unless they are stated in the Agreement;³ and (4) requiring Tenant to have access during the time periods consistent with Section 12 and barring Landlord from entering the remises without Tenant's consent.⁴

The court reserved decision on whether Tenant established a prima facie breach of contract based on Landlord's denial of access. (NYSCEF 100, Tr., 25:8-14). If Tenant established such a breach, then the issue becomes whether Landlord raised an issue of fact as to that breach.⁵

As a preliminary matter, the court rejects Landlord's argument that Tenant's motion is insufficient because it relies on an attorney affidavit. First, an attorney affidavit is sufficient on a motion for summary judgment when the motion rests on documentary evidence as it does here. (*Olan v Farrell Lines, Inc.*, 64 NY2d 1092 [1985] [proof may be put before court with an attorney affirmation on a 3212 motion for summary judgment]). Indeed, an attorney affirmation attaching a contract on which the motion for summary judgment is based is precisely the way to support such a motion. (See *Lewis*

¹ The court corrects the ordered language for this declaratory judgment with this supplemental order.

² While the court granted Tenant's motion on July 8, 2019, it failed to actually dismiss the counterclaim which is properly directed in this supplemental decision and order.

³ This relief is more accurately characterized as a preliminary injunction as it is based on something that Landlord threatened to do. (CPLR 6301). Also the ordered language is consistent with an injunction not a declaratory judgment.

⁴ See footnote 3 above.

⁵ The court also reserved decision on Tenant's request for attorneys' fees.

v Safety Disposal Sys. of Pennsylvania, Inc., 12 AD3d 324 [1st Dept 2004]). Second, the verified complaint is the equivalent of an affidavit pursuant to CPLR 105(u) and may be used to support a motion for summary judgment. (*ARC Mun. Sec. Corp. v Kleinberg, Kaplan, Wolff & Cohen, P.C.*, 171 AD2d 441 [1st Dept], appeal dismissed without op, 78 NY2d 1006 (1991)).

The court also rejects Landlord's argument that Tenant failed to request declaratory relief. The complaint is entitled "Verified Complaint for Injunctive and Declaratory Relief." Consistent with CPLR 3017(b), Tenant also lists declaratory relief in its list of remedies. (NYSCEF 66, Complaint p. 13, ¶2). By dismissing Landlord's counterclaim for the opposite declaratory relief, the court is effectively granting Tenant reverse summary judgment. (CPLR 3212[e]). While requesting a declaratory judgment in the remedy section of a complaint is a bit unorthodox, it put Landlord on notice and could not possibly surprise it. (See CPLR 3018[b]). Landlord's reliance on *Am. Hydrocarbon Corp. v Selby*, 47 Misc 2d 777 (Sup Ct, NY County 1965) for the proposition that the complaint fails to inform Landlord of Tenant's request for a declaratory judgment is absurd.

Tenant's motion is denied as to its request for a declaratory judgment that, as alleged in the 2015 complaint, Landlord improperly denied Tenant access to the premises. On September 13, 2019, this court ordered that Landlord cannot impose restrictions or conditions on Tenant's representative's access to the Premises that are not expressly stated in the Agreement. (NYSCEF 100). Again, this relief is akin to a preliminary injunction as it applies to Tenant's access to the Premises in the future and is irrelevant to the alleged denial of access in past. To be clear, this injunctive relief is

still in effect. The request for declaratory relief is based on acts in the past which breached the Agreement. Thus, the request for this declaratory relief is contingent on a finding that Landlord breached the Agreement in the past. While Tenant alleges in the verified complaint that it has been denied access on multiple occasions, the complaint is silent on the issue of onerous restrictions outside the scope of the Agreement. Tenant's reliance on an undated letter received in September 2016 from Adam Leitman Bailey, Esq., Landlord's counsel, as proof that Landlord impermissibly restricted Tenant's access prior to the 2015 complaint is insufficient to establish its prima facie claim for breach of contract.

Whether Landlord breached the Agreement is a material issue rendering this motion premature in the absence of any discovery in this 2015 action. (CPLR 3212(f)). Landlord is entitled to some discovery before the court would take the drastic step of concluding that Landlord breached the Agreement with onerous restrictions. Accordingly, it is unnecessary to reach the issue of the inadequacy of Landlord's opposition to this part of the motion for summary judgment. In her March 21, 2019 affidavit verifying Landlord's answer, Gabiella Garzoni fails to state her connection to Landlord, the source of her information, or qualifications to verify the answer.

In the absence of opposition and based on the Agreement §23(l), Tenant's request for attorneys' fees is granted. Within 30 days, Tenant shall submit an affirmation of services including times sheets and resumes without prejudice to supplementing its request for attorneys' fees at the conclusion of this action, if appropriate.

Accordingly, it is

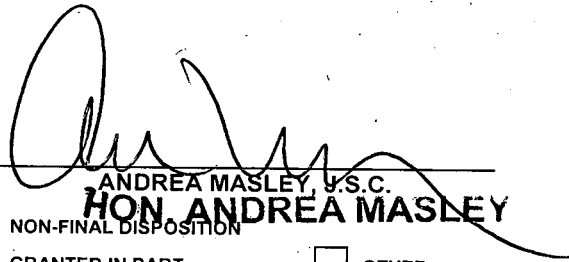
ORDERED that Tenant's motion is granted in part as its request for a declaratory judgment as detailed below, but denied as to Tenant's motion for summary judgment on its breach of contract for denying access in the past; and it is further

ADJUDGED and DECLARED that the parties Option and Structure Lease Agreement dated May 4, 2010 is unambiguous with Section 2 setting forth all of Tenant's permitted uses and Section 12 setting forth the timing of access for such used by Tenant's employees, agents and/or subcontractors, and that based on these provisions Tenant's employees, agents and/or subcontractors shall have access to the Premises, as defined in the Option and Structure Lease Agreement and Landlord must allow such access in accordance with the Option and Structure Lease Agreement; and it is further

ORDERED that Tenant's motion for summary judgment dismissing Landlord's counterclaim for a declaratory judgment is granted; and it is further

ORDERED that Tenant's request for attorneys' fees is granted and Tenant shall submit an affirmation of services within 30 days; Landlords shall have 30 days to submit opposition thereto.

1/3/2020
DATE


ANDREA MASLEY, U.S.C.
HON. ANDREA MASLEY

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: