Fusulag Corp. v Bock Realty Corp.
2020 NY Slip Op 33993(U)
November 30, 2020
Supreme Court, Kings County
Docket Number: 520454/19
Judge: Leon Ruchelsman

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

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FUSULAG CORP.,

Plaintiff, Decision and order

- against - Index No. 520454/19

BOCK REALTY CORP.,

Defendant, November 30, 2020

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking a Yellowstone injunction, specifically an injunction preventing the defendant from interfering with plaintiff's insurance settlement following a fire that took place at the premises on October 23, 2019 and a finding the landlord engaged in harassment. Further, the plaintiff has moved seeking to amend the complaint. The defendant has opposed the motion and has cross-moved seeking summary judgement the plaintiff has defaulted under certain terms of the lease. Those terms of the lease all concern the fire and work subsequently performed after the fire. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

Preliminarily, the defendant's cross-motion is proper and will be considered.

As recorded in prior orders, on August 26, 1985 the plaintiff tenant entered into a lease with landlord concerning the rental of space located at 369-71 Flatbush Avenue in Kings County. A default notice dated June 9, 2020 was served upon the

plaintiff alleging one default, namely that the plaintiff has failed to discharge a mechanic's lien filed by Upper Restoration Inc., hired by the plaintiff, for work allegedly performed at the premises. The plaintiff asserts the defendant has failed to execute certain documents necessary for the insurance settlement funds to be released which could be used to discharge the mechanic's lien, thus, the defendant is the cause of the existence of such lien. A thorough review of the facts in this case is therefore necessary.

On December 6, 2019 and December 9, 2019, about seven weeks after the fire, the defendant was aware of the fire, the insurance company's involvement and that a contractor was hired to engage in renovations of the premises. In an email from plaintiff's counsel to defendant's counsel sent on December 6, 2019 plaintiff's counsel noted that "our client has, as of this week, now been authorized by its insurer to proceed with interior demolition of the store that will abate any odor from the fire and our client will diligently pursue that work to completion" (see, Email dated December 6, 2019 sent 2:20 PM). A few days later plaintiff's counsel sent another email to defendant's counsel that noted "confirming that a crew will be performing interior clean-up at the premises today" (see, Email dated December 9, 2019 sent 10:03 AM). While these emails do not reveal the extent of the work being performed, the defendant was

surely on notice that an insurance claim had been filed and someone had been hired to perform interior clean up. Moreover, these emails do not satisfy the strict notice requirements of Article 27 of the Lease which demand all such notices to be served by registered or certified mail.

On March 19, 2020 the tenant informed landlord that since the fire had rendered the premises 'wholly unusable' pursuant to Article 9 of the Lease they were suspending the payment of rent. On April 22, 2020 the landlord served another notice of default based upon the belief the plaintiff was making structural changes without permission from the landlord, had hired contractors without landlord's approval and failed to obtain necessary permits for such work. On April 26, 2020 Ramzey Ahmad the president of Fusulag stated in an affidavit that "no electrical or structural work was or is being performed" (see, Affidavit of Ramzey Ahmad, ¶7). Further, Ahmad explained the Department of Buildings issued a violation because the inspector mistook wires hanging as a result of the fire as evidence of electrical and other work. Ahmad reiterated that they performed "no work, electrical, structural, or otherwise, that might have triggered any obligation to obtain Landlord's consent under the Lease" (id at ¶8). Ahmad further argued that "Landlord should also be barred from claiming that Tenant does not have authorization to restore the Premises following the October 2019

fire, as Landlord's principal, Charles Bock, has repeatedly requested, beginning an hour after the fire, that Tenant restore the Premises, despite that being Landlord's obligation under the Lease. Even if we had performed work for which Landlord's consent might be required (we have not), Landlord has already consented to that work" (id at ¶9). Indeed, the plaintiff served a supplemented verified complaint and asserted that "the October 23, 2019 fire constituted casualty that rendered the Premises entirely unusable, thereby suspending Tenant's obligation to pay rent and additional rent and obligating Landlord to restore the premises" (Supplemented Verified Complaint, ¶26). The second and third causes of action of the new complaint seek a permanent injunction and a declaratory judgement that none of the defaults alleged are valid and thus defendant cannot terminate the lease. The defendant seeks summary judgement dismissing those causes of action.

Further, pursuant to the Lease the tenant was required to notify the landlord, in writing, that a fire had taken place. While, as noted, the landlord was aware a fire had taken place they were never notified pursuant to the requirements of the lease.

The current application concerns the mechanic's lien filed by Upper Restoration Inc. The plaintiff argues they have not paid the contractor because the defendant has refused to sign

insurance checks which could be used as payment. Indeed, Anthony Bracco, the principal of Upper Restoration submitted two affidavits. In the first one he stated that he was hired the day after the fire "to demolish and remove to the bare structure all improvements to the interior portion of the Building, and fixtures and equipment previously used by the Supermarket" (see, Affidavit of Anthony Bracco, July 3, 2020, ¶5). Mr. Bracco explained that he "did not observe any structural or catastrophic damage to the Building in which the Supermarket was located. The structural walls were intact and in good condition, and the roof rafters were intact and structurally sound. The fire did not consume or destroy any structural part of the Building and did not affect the structural integrity of the Building at all" (id at ¶7). Rather, Mr. Bracco explained, his company performed "a demo/gut renovation, demolished and removed to the bare structure all improvements to the interior portion of the Building, and the fixtures and equipment previously used by the Supermarket" (id at ¶8). In an affidavit dated September 23, 2020 Mr. Bracco reiterated that the "emergency work included, among other remedial measures, the installation of temporary roofing (because portions of the roof had been removed or compromised when the Fire Department extinguished the fire), removal of store fixtures and property (when specifically permitted by the supermarket's insurer), interior demolition of those portions of the Premises

that were damaged beyond repair, and general clean-up following the fire" (see, Affidavit of Anthony Bracco, September 23, 2020, ¶3). Notwithstanding a possible inconsistency concerning the roof which is not germane to this motion, there can be no dispute that Upper Restoration was doing more than just clean up work at the supermarket. Further, on July 1, 2020 the Office of Administrative Trials and Hearings (OATH) conducted a hearing concerning four violations served at the supermarket for various building code violations. All the violations were sustained including the conclusion reached that demolition work was taking place at the supermarket. Moreover, Upper Restoration sued the plaintiff and the defendant seeking payment for the work performed. In Paragraph 9 of that complaint, Upper Restoration describes their work as follows: "on or about October 24, 2019, Upper Restoration was hired by Fusulag to demolish the Premises, perform asbestos abatement, remove to the bare structure all improvements in the interior of the Premises including the fixtures and equipment utilized to run the Supermarket" (see, Verified Summons and Complaint, *Upper Restoration v. Fusulag Corp., Bock Realty Corp., et, al*, submitted as Document #199 to the NYSCEF).

Article 3 of the Lease prohibits the tenant from making any changes "of any nature" without the landlord's prior written consent. Further, Article 3 prohibits the tenant from making any

changes, even non-structural changes, without the landlord approving the contractor who will be performing the work. Lastly, Article 3 requires the tenant to secure all necessary permits before engaging in such work. The evidence presented demonstrates there are no questions of fact the tenant breached all three requirements of Article 3. Ahmed's affidavit stressed that "no work" was being done at the premises, just clean up, however, the undisputed evidence clearly demonstrates that work triggering Article 3 was indeed being performed at the supermarket.

The plaintiff does not dispute they performed work at the premises without complying with the provisions of the lease. Rather, they assert the landlord deliberately withheld approval of plans thus facilitating a confirmation of the violations by the Hearing Officer. The plaintiff argues that "landlord, through its counsel, refused to sign-off on filings that were prepared so that the violations could be timely resolved, and then appeared at the scheduled hearing—without either the retained architect or contractor—and effectively consented to the confirmation of the violations and imposition of penalties" (Affidavit in Opposition to Cross-Motion and in Further Support of the Motion, ¶10). That argument does not explain how the tenant engaged in renovation work without landlord's consent in the first place. Moreover, by failing to sign off on any

paperwork the landlord was exercising their rights under the lease. Thus, the failure to sign off on the work was not an impropriety committed by the landlord. On the contrary, the entire enterprise of hiring workers to perform such work was a violation of the lease on the part of the tenant.

The tenant next argues the landlord has been deceptive about its knowledge whether the premises was rendered wholly unusable. First, there is no conclusive proof whether the premises were rendered wholly unusable. The affidavits of Anthony Bracco are equivocal since they acknowledge there was no structural damage but also concede they were hired to perform more than mere clean up work. In any event, the knowledge of the landlord in this regard is irrelevant since that does not contribute in any way to the plaintiff's renovation work in violation of the provisions of the lease. Further, it is inconsistent to argue the premises were rendered wholly unusable but at the same time no work was being performed at the premises that required landlord's consent or approval.

Further, the tenant makes the curious argument that landlord demanded tenant repair the premises and pay rent in contravention of the lease and that such position prevents the landlord from taking a different position now. However, the tenant does not explain why they indeed continued to pay rent and engage in repairs of the property in contravention of the lease.

In any event, again that argument is irrelevant to plaintiff's engaging in demolition work in violation of the above mentioned three provisions of Article 3 of the lease.

The plaintiff also argues the determinations of the OATH hearing are not defaults since they can be cured. The court already ruled that such violations could not be cured. In any event, once again, that is irrelevant since the OATH hearings only further support the unmistakable conclusion the tenant breached the lease by engaging in work without prior consent and approval from the landlord and without the necessary permits.

Therefore, based on the foregoing, the cross-motion seeking to dismiss the second and third causes of action of the supplemented verified complaint is granted. Considering the above conclusion, the motion seeking harassment is denied and consequently the motion seeking to amend the complaint to add a claim for harassment pursuant to 22 NYCRR §903 et seq. is denied.

Concerning the Yellowstone request regarding the mechanic's lien, the tenant argues the landlord has encouraged this default by failing to sign insurance checks which could be used to pay Upper Restoration. The defendant counters that such work was performed in violation of the lease and consequently they do not approve of such payment. However, the insurance proceeds were specifically earmarked for fire damage to the premises and notwithstanding defendant's reluctance to

acknowledge these payments, indeed, the defendant's name appears on such checks requiring their signature. Thus, without waiving any further rights or contentions in this lawsuit the failure to so endorse those checks has caused the filing of the mechanic's lien. Furthermore, there is no dispute that Upper Restoration is entitled to the payment amounts contained in those checks. Therefore, the plaintiff's request seeking a Yellowstone injunction regarding the mechanic's lien is granted and the motion seeking to amend the complaint to add a cause of action in this regard is likewise granted.

So ordered.

ENTER:

DATED: November 30, 2020
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC