44-45 Broadway Leasing Co., LLC v 45th St. Hospitality Partners, LLC
2020 NY Slip Op 34001(U)
December 3, 2020
Supreme Court, New York County
Docket Number: 652816/2016
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO **PART** IAS MOTION 41EFM

Justice

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44-45 BROADWAY LEASING CO., LLC.,

Plaintiff,

- v -

45TH ST. HOSPITALITY PARTNERS, LLC, SHELDON FIREMAN

Defendant.

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INDEX NO. 652816/2016

MOTION DATE 09/11/2019, 09/11/2019

MOTION SEQ. NO. 003 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 236

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 227, 228, 229, 230, 231, 232, 233, 234, 237

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this action to recover damages related to end-of-lease obligations, both plaintiff and defendants move for summary judgment. Defendants 45th St. Hospitality Partners, LLC ("Hospitality") and Sheldon Fireman move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and granting defendants' counterclaims. Plaintiff 44-45 Broadway Leasing Co., LLC moves, pursuant to CPLR 3212, for an order granting plaintiff summary judgment on its complaint and dismissing defendants' counterclaims. These motions, sequence numbers 003 and 005, are consolidated for decision herein.

Plaintiff and defendant 45th St. Hospitality Partners, LLC ("Hospitality") entered into a written lease agreement dated February 18, 2004 for the premises located at 1514-1530 Broadway, New York, New York. In connection with the lease, defendant Sheldon Fireman executed a personal guaranty for certain of Hospitality's obligations under the lease, including

the obligation to pay all fixed and additional rent due under the lease. Throughout the lease term Hospitality used the premises to operate a restaurant. The premises were delivered to defendants as what both sides refer to as a "cold dark shell" and consequently Hospitality made significant alterations, improvements, and installations to it.

The lease provided for a fifteen-year term, however plaintiff reserved the right to terminate the lease as of January 31, 2016, if the lease for the anchor tenant expired by that date. By a termination notice dated March 3, 2015, plaintiff exercised its right to designate January 31, 2016 as the lease expiration date. By notice dated May 19, 2015, plaintiff exercised its rights under the lease to demand that Hospitality perform its end-of-term removal and restoration obligations. By letter dated January 12, 2016 Hospitality advised plaintiff that it considered any lease restoration obligations inapplicable and extinguished. Hospitality vacated the premises and returned possession of same to plaintiff on January 31, 2016.

Defendants argue that Section 13.01(c) of the parties' lease expressly provides that Hospitality has no obligation to restore the premises if plaintiff intended to demolish or substantially alter the building, which defendants contend plaintiff intended to do and, in fact, did. Defendants assert any removal efforts would, in this context, constitute restoration work. Defendants further argue that even if their removal and restoration obligations were not extinguished, any such obligations would apply only to property that could be removed from the premises without causing material damage, and as these obligations were fulfilled, any remaining improvements became plaintiff's responsibility.

Plaintiff argues that three provisions of the lease require Hospitality to perform both removal and restoration work at or before the expiration of the lease term. Plaintiff asserts that even if plaintiff intended to substantially alter the building, Hospitality would still be required to perform the independently required removal work. Plaintiff further asserts that whether the building underwent a substantial alteration or whether plaintiff formed the intent to do so are issues of fact which preclude summary judgment. Finally, plaintiff argues it is also entitled to summary judgment on its causes of action against Fireman for additional rent, the costs incurred to plaintiff in performing end-of-lease removal work, and for costs and expenses in enforcing the guaranty.

"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]). Once the proponent has met this showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*). To defeat a motion for summary judgment, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In *Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.* 63 NY2d 396, the Court of Appeals found that the following constituted substantial structural modifications:

> "(1) extending an existing sign canopy, which would require piercing the roof's waterproofing membrane; (2) adding decorative brick fascia to the I-beams that would support the canopy extension; (3) installing a new ingress/egress door and a related glass front; and (4) adding a loading door at the rear of the building" (*Id.* at 400 [1984]).

Where a building is gutted, there can be no factual dispute as to whether the building was substantially re-altered (*Nextel of New York, Inc. v 36-40 Gansevoort Realty LLC*, 2006 NY Slip Op. 30769[U], 7 [NY Sup Ct, New York County 2006]).

Upon review of the evidence submitted on these motions, it is clear that the premises' subsequent renovation constituted a substantial alteration. Here, defendants have provided evidence in the form of an affidavit from Donald Curtis, a principal of a development and construction consulting firm, that the building was gutted and that all finished areas of the building were demolished. His assessment relies on the general contract between plaintiff and a construction firm; permits with the New York City Department of Buildings; as well as public records referring to alteration of the building. As such, defendants made a *prima facie* showing that the building was substantially altered.

The proofs here also clearly indicate that the landlord intended to substantially alter the building following the expiration of the lease. Defendants submitted evidence of a general

contract entered into two days after the expiration of the lease, between plaintiff and a construction firm, which contemplates a $40 million renovation. Defendants also demonstrate through emails and meeting notes that this general contract was being negotiated prior to the expiration of the lease. In response, plaintiff simply asserts that evidence points to landlord never having formed an intention to substantially alter the building. Plaintiff further maintains that any work was done "by or on behalf of outgoing tenants." These conclusory statements do not amount to an issue of fact sufficient to defeat summary judgment. Further, Section 13.01(c) of the parties' lease is triggered by the landlord's intent to substantially alter the building, and there is no carve out for specific reasons why the alteration is contemplated. As such, even if the work was done by or on behalf of another tenant, the provision would still apply.

In interpreting contracts, courts apply to proposition that the parties' agreement should be enforced according to its terms and "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal citations and quotations omitted]). Where parties to a contract omit terms, the maxim *expression unius est exclusion alterius* dictates that the Court must find that the parties intended the omission (*see Quadrant Structured Products Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014]). "Courts are obliged to interpret a contract so as to give meaning to all of its terms" (*Mionis v Bank Julius Baer & Co., Ltd.*, 301 AD2d 104, 109 [1st Dept 2002], [internal citations omitted]).

Here, the lease provides an exemption from restoration obligations, but not removal obligations, where landlord intends to substantially alter the building. The last sentence of Section 13.01(c) provides that "Tenant shall have no obligation to perform any restoration work if Landlord intends to demolish or substantially alter the Building following the expiration or termination of this Lease."

Defendants claim that restoration as a lease term has two meanings: (i) to return the premises to their original condition, and (ii) to repair any damage caused by removing improvements or property. They argue that as removal would have returned the premises to their original condition, a "cold dark shell," substantial alteration obviates the removal

obligation which is necessarily included in any restoration efforts. In response, plaintiff argues instead that these two distinct meanings of the term "restore" indicate that removal and restoration obligations are independent, and that restoration can apply where there is damage caused by either installations or by their removal. While the two terms "remove" and "restore" are used in three separate sections of the lease within Section 13.01(c), the last sentence specifically only refers to eliminating the obligation to perform restoration work. In interpreting this lease and giving meaning to all of its terms, this Court concludes that the parties intended to omit the term "removal." Therefore, the obligation to remove is not obviated by landlord's intention to substantially alter the building.

Defendants next argue that even if removal and restoration are distinguishable, plaintiff is still entitled to summary judgment as all remaining improvements were of such a nature that they could not be removed without causing material damage to the premises. Defendants rely on the first sentence of 13.01(c), which states all improvements "affixed to the realty so that they cannot be removed without material damage, shall, unless Landlord elects otherwise, when it approves the Plans for Tenant's Work become the property of Landlord and shall remain upon, and be surrendered with, the Demised Premises." They claim that as plaintiff did not elect to require removal of Tenant's Work at the time the plans were approved, these improvements became plaintiff's property and extinguished defendant's obligation to remove them at the end of the lease term.

However, Section 13.01 also provides that "if Landlord shall elect, not less than thirty (30) days prior to the expiration of this Lease, to require the removal of any Tenant's Work referred to above, Tenant shall at its expense, at or before the expiration of the Term, remove said property and in case of damage by reason of such removal, restore the Demised Premises to good order and condition." The term "Tenant's Work" as defined in Section 13.01 contains an exception: "[e]xcept for Landlord's work, all alterations, installations, additions, improvements, decorations or any other work necessary or desirable to make the Demised Premises suitable for Tenant's use." Thus, plaintiff only needed to elect to require removal not less than 30 days prior to the lease's expiration, rather than at the time of approval of the work

plans. As notice of plaintiff's election to require removal was provided, defendants were required to remove improvements.

While it has been established that defendants had an obligation to perform removal work, issues of fact remain as to whether, and to what extent, any such removal work was actually completed by defendants. Defendants claim to have conducted removal of all improvements that would not cause material damages, whereas, plaintiff asserts that further removal operations which did not materially damage the premises were conducted at their own expense. Accordingly, both plaintiff's and defendants' motions for summary judgment are denied.

As provided for in the lease and guaranty, tenant and guarantor will be liable for any additional rent, reasonable costs and expenses including costs incurred by plaintiff to perform end-of-lease removal work, and attorneys' fees incurred in enforcing the lease, in the event that plaintiff is ultimately the prevailing party.

Finally, plaintiff asserts that it is entitled to summary judgment dismissing defendants' counterclaims as prohibited by the lease. While plaintiff asserts that New York courts routinely uphold similar provisions, the cases cited by plaintiff upholding these provisions all involve summary proceedings (*see Amdar Co. v Hahalis*, 145 Misc 2d 987, 987-88 [App Term 1990], citing *Bomze v Jaybee Photo Suppliers*, 117 Misc 2d957 [1983]). As such, defendants' counterclaims may go forward, including the counterclaim for use and occupancy, as there is an issue of fact as to whether the failure to remove installations constitutes a failure by defendants to vacate the premises.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint and granting its counterclaims is denied; and it is further

ORDERED that plaintiff's motion for summary judgment on its claims in the complaint and to dismiss defendants' counterclaims is also denied; and it is further

ORDERED that all parties are directed to appear for a status conference on March 4, 2020 in Room 490, 111 Centre Street.

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12/3/2020
DATE

ANTHONY CANNATARO, J.S.C.

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