301 E. 22nd St. Tenants Corp. v 9th Ave. Bus. Servs., Inc.
2021 NY Slip Op 32313(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 158663/2020
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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301 EAST 22ND STREET TENANTS CORP.,

Plaintiff,

- V -

9TH AVENUE BUSINESS SERVICES, INC., BRADLEY KAPLAN

Defendant.

INDEX NO. 158663/2020

MOTION DATE 05/27/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33
were read on this motion to/for JUDGMENT - SUMMARY

Plaintiff 301 East 22nd Street Tenants Corp., moves pursuant to CPLR §3025(c), to amend the pleadings to conform to the evidence adduced herein to include all amounts due through the date this motion is to be heard; and pursuant to CPLR §3212, granting Plaintiff summary judgment, jointly and severally, against Defendants, awarding Plaintiff a money judgment of $59,800.59 to be adjusted upward through the date of judgment, plus statutory interest, costs, fees, and disbursements, and setting the matter down for a hearing to determine Plaintiff's reasonable attorneys' fees and costs pursuant to the lease and guaranty agreement. Plaintiff further moves pursuant to CPLR §3212, granting Plaintiff declaratory judgment against Defendant Bradley E. Kaplan and pursuant to CPLR §3211(a) dismissing Defendants' affirmative defenses and pursuant to CPLR §§3111 and 3212, dismissing Defendants' counterclaims; and for such other, further and different relief as is just and proper.

In opposition, Defendants contend that they were partially, actually, and constructively evicted once asbestos was revealed during construction, and additional permits and paperwork

were required from the City of New York before any additional work could proceed. Defendants further allege that due to the Covid-19 pandemic, it was impossible to obtain permits on a timely basis to move forward with the work.

Defendants incorrectly state that a preliminary conference order has been issued in this matter without an attorney representing defendant. There has been no such order as a preliminary conference has not yet occurred. Further, Defendants erroneously contend that mandatory mediation has been ordered in this matter.

Factual Allegations

Affidavit of Mary Frances Shaughnessy

In support of its motion, Plaintiff submits the affidavit of Mary Frances Shaughnessy, an officer who oversees all aspects of managing the building located at 301 East 22nd Street, New York, New York, including rent collection, billing, and lease compliance (NYSCEF Doc. No. 9). She states that 9th Ave., as tenant, entered into a March 31, 2005 commercial lease (the "Lease") with Plaintiff, as landlord, where it leased the store premises within the Building for a term of fifteen (15) years and three (3) months. (*Id.*, NYSCEF Doc. No. 15). Ms. Shaughnessy states that the Lease was amended pursuant to a July 1, 2011 agreement (NYSCEF Doc. No. 16) and that concurrently with execution of the Lease, Defendant Bradley E. Kaplan as Guarantor, executed a guaranty of lease dated March 31, 2005 (NYSCEF Doc. No. 17), wherein he personally guaranteed Tenant's Lease obligations including, but not limited to, Tenant's monetary obligations. Defendant Kaplan is the President of 9th Avenue Business Services, Inc., and the space is used as "The UPS Store" (NYSCEF Doc. 9).

Ms. Shaughnessy contends that commencing January 2020, Defendants stopped paying rent and additional rent (*Id.*). She further alleges that on or about Memorial Day weekend,

although it still maintained property and had full access to the Premises, Defendants began doing business at a location across the street from the Premises (*Id.*).

She further states that on July 31, 2020, the Lease expired, and that Defendants are no longer in possession of the Premises (*Id.*). Ms. Shaughnessy avers that at no time did the Premises present a hazard from asbestos, nor did landlord interfere with Defendants' ability to use the Premises (*Id.*).

The Lease

Pursuant to the Lease, Defendant agreed to pay monthly rent of $6,333.86. for the period of April 1, 2019 through and including March 31, 2020 (NYSCEF Doc. No. 15). Pursuant to First Amendment to Lease, Defendant agreed to pay monthly rent of $6,523.88, for the period of April 1, 2020 through and including July 31, 2020. (NYSCEF Doc. No. 16). Further, Defendant agreed to pay as additional rent, a proportionate share of the real estate taxes assessed against the Building above the base tax year. (*Id.*). The First Amendment to the Lease specified that from July 1, 2010 to June 30, 2011, Defendant was to pay the increases in real estate taxes at 1.2% of any increase. (*Id.*). Defendant further agreed to pay, as additional rent, a late charge equal to two percent (2%) above the Citibank N.A. prime rate (3.25%) of the outstanding balance of monthly rent and additional rent, if the monthly rent was not received within ten (10) days from the due date. (*Id.*). The Lease also required Defendant to pay and reimburse Landlord for any expenditure, including but not limited to, its reasonable attorney's fees and costs in enforcing the Lease's covenant to pay rent. (NYSCEF Doc. No. 15). According the Lease, Defendant was also required to "install, maintain and repair all at Tenant's sole cost and expense, any and all existing or future heating, ventilating and air-conditioning equipment required to serve the Demised Premises" (*Id.*).

The Guaranty

Defendant Kaplan signed the Guaranty, under which he became personally responsible for all of Tenant's responsibilities including all monetary obligations. (NYSCEF Doc. No. 17). The Guaranty provides, in relevant part, that:

> the undersigned does hereby guarantee to Landlord . . . (b) the full payment, performance and observance of all the terms, covenants and conditions therein expressed on said Tenant's part to be paid, performed and observed, and also all damages that may arise in consequence of said non-payment, non-performance or non-observance of said terms, covenants or conditions . . .
> The undersigned hereby does further covenant and agree to and with said Landlord that the undersigned may be joined in any action against said Tenant in connection with the Lease and that recovery may be had against the undersigned in such action or in any independent action against the undersigned without said Landlord first pursuing or exhausting any remedy or claim against said Tenant, is successors or assigns. . . .The undersigned hereby waives all right to trial by jury in any action or proceeding hereinafter instituted by said Landlord to which the undersigned may be a party. This Guaranty shall be governed by and construed under the laws of the State of New York. (*Id.*).

Defendant Bradley E. Kaplan's Affidavit

Mr. Kaplan states that he is the President of the Defendant/Tenant 9th Avenue Business Services Inc. (NYSCEF Doc. No. 24). He states that the Lease was set to expire on or about July 31, 2020. (*Id.*). Mr. Kaplan further states that during 2019, it became apparent that the Air Conditioning equipment needed to be replaced. (*Id.*). He contends that he filed for proper permits as required by law in order to proceed. (*Id.*). Further, he states that part of the procedure was a required test for asbestos in the walls, which testing revealed asbestos in the walls. (*Id.*). Mr. Kaplan states that he understood that Plaintiff knew about the asbestos as a result of the 2018 work that had been done in the adjacent store known as DaVinci Arti Supply. (*Id.*). He further

states that he was not aware of any permits that Plaintiff obtained for its work as he did not observe any permits posted on the windows of the store. (*Id.*).

Mr. Kaplan also states that he had been exposed to toxic dust during the 2018 renovation without his knowledge and that the presence of asbestos partially, actually, and constructively evicted him from the premises. (*Id.*). He states that the presence of asbestos required additional permits and filings before he could do the air conditioning work. (*Id.*). Mr. Kaplan contends that by this time it was March 2020, and he could not obtain any permits from the City due to the COVID-19 pandemic.

Mr Kaplan also contends that Plaintiff informed him that it would not be renewing his lease, which he believes is because of he complained about the asbestos. (*Id.*). He states that he surrendered the keys on or about May 29, 2020. (*Id.*).

Analysis

Leave to Amend

Plaintiff moves to amend the pleadings to conform to the evidence adduced herein to include all amounts due through the date this motion is to be heard. Defendants did not oppose this relief. Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party (*see* CPLR §3025(b); *see also Solomon Holding Corp. v Golia*, 55 AD3d 507, 507 [1st Dept 2008]. Accordingly, Plaintiff's motion to amend the pleadings to include amounts due through the date of this decision is granted.

Summary Judgment

"'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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept

2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

Issues of credibility are not to be resolved on summary judgment (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]).

Plaintiff contends that it is entitled to summary judgment as it has established a prima facie case by presenting the lease, nonpayment by Defendants since January 2020, and the Guaranty. In opposition, Defendants contend that the presence of asbestos, which Plaintiff allegedly knew about, partially, actively, and constructively evicted them from the premises.

Plaintiff has not met its burden on summary judgment. Initially, the court notes that discovery has not yet commenced resulting in a lack of evidence in support of Plaintiff's motion for summary judgment. Further, there remains a question of fact as to whether the landlord engaged in any behavior that in effect resulted in evicting Defendants from the premises.

Declaratory Judgment

Plaintiff's Notice of Motion states that it is seeking a declaratory judgment pursuant to CPLR 3212 against Defendant Bradley E. Kaplan. However, Plaintiff's memorandum of law indicates that it is seeking a declaratory judgment stating that New York City Administrative

Code § 22-1005 does not apply in the present case. Further, Plaintiff's second cause of action seeks a declaratory finding that New York City Administrative Code § 22-1005 unenforceable and unconstitutional.

Plaintiff's pre-discovery motion has failed to establish a *prima facie* entitlement to judgment as a matter of law. Accordingly, Plaintiff's motion for declaratory judgment is denied.

Motion to Dismiss

Plaintiff additionally moves pursuant to CPLR §3211(a) dismissing Defendants' affirmative defenses and pursuant to CPLR §§3111 and 3212, dismissing Defendants' counterclaims. Defendants pled seven affirmative defenses- failure to state a cause of action; *force majeure*; accord and satisfaction and/or estoppel; impossibility of performance and frustration of purpose; violation of public policy and governmental edicts; actual, partial and constructively eviction; and landlord's campaign of harassment.

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994] *citing Morone v Morone*, 50 NY2d 481, 429 NYS2d 592 [1980]; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 389 NYS2d 314 [1976]). The court must accept facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon*, 84 NY2d 83). Moreover, an order of dismissal pursuant to CPLR 3211(a)(1) may be granted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Id.* at 88). Generally, a document relied upon by the moving party seeking dismissal pursuant to CPLR 3211(a)(1) will qualify as documentary evidence if it is

unambiguous and of undisputed authenticity (*Anderson v Armentano*, 139 AD3d 769, 33 NYS3d 294 [2d Dept 2016]).

First Affirmative Defense

Defendants' First Affirmative Defense merely states that the Complaint fails to state a cause of action (NYSCEF Doc. No. 32). No factual allegations are alleged to support this blanket affirmative defense. Further, the complaint on its face states a cause of action, and therefore defendant's first affirmative defense is dismissed (*McGhee v Odell*, 96 AD3d 449, 946 NYS2d 134 [1st Dept 2012]; *Berkshire Hathaway Specialty Ins. Co. v H.I.G. Cap., LLC*, 193 AD3d 605, 142 NYS3d 806, 807 [2021]; *see B. R. DeWitt, Inc. v Nalews, Inc.*, 65 AD2d 915, 916, 410 NYS2d 467, 468 [1978]).

Second, Fourth and Fifth Affirmative Defenses

Defendants' second, fourth and fifth affirmative defenses rely upon the effect the COVID-19 Pandemic and multiple governmental edicts, orders, etc. had upon the Defendants' business. Defendants contend that portions of the rent due must be abated as a result of forced closings and other limitations legally imposed on tenant, and without any fault of tenant. (NYSCEF Doc. No. 32). Defendants sufficiently contend that the COVID-19 pandemic and the Governor's executive orders effected its ability to remain open and to complete the air conditioning construction work. Accepting the facts as alleged and providing Defendants the benefit of every possible favorable inference, the Court finds that Defendants have sufficiently plead affirmative defenses as to *force majeure*; impossibility of performance and frustration of purpose; violation of public policy and governmental edicts.

Third Affirmative Defense

Defendants plead as its third affirmative defense that some or all of the rent alleged to be due is barred by the doctrine of accord and satisfaction and/or estoppel. However, Defendants fail to allege any factual allegations that would support such an affirmative defense. Accordingly, Plaintiff's motion to dismiss is granted as to the third affirmative defense.

Sixth Affirmative Defense

Defendants contend that the presence of asbestos resulted in their being partially, actually, and constructively evicted from the premises. To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises (*Barash v Pennsylvania Terminal Real Est. Corp.*, 26 NY2d 77, 82, 256 NE2d 707, 709 [1970]). Of course, the tenant must have been deprived of something to which he was entitled under or by virtue of the lease (52 C.J.S. Landlord & Tenant s 477, p. 292). Defendants have adequately pled the sixth affirmative defense to survive Plaintiff's motion to dismiss.

Seventh Affirmative Defense

Defendants contend that hat the Plaintiff, in or about January 2020, notified the Defendants that their lease and occupancy would not be extended, which resulted in the building superintendent and broker commencing a course of conduct to annoy, harass, and interfere with Defendants' quiet enjoyment of the space by parading multiple potential clients in and through the space at all times without giving Defendants any notice of the showings. Further, Defendants contend that the building superintendent was repeatedly heard to disparage Defendants, in front of their customers, as part of this campaign of harassment and also spray-painted signs

Defendants had placed which indicated to their customers where their new location would be. Defendants have sufficiently pled this affirmative defense.

Counterclaims

Defendants assert three counterclaims for an abatement/set-off; attorneys fees and a declaratory judgment stating that they do not owe any rent. Defendants counterclaims are adequately pled to survive Plaintiff's motion to dismiss.

Accordingly, it is hereby

ORDERED that Plaintiff's motion to amend the pleadings to conform with the updated amount of rent allegedly outstanding is granted; and it is further

ORDERED that Plaintiff's motion for summary judgment and for declaratory judgment is denied; and it is further

ORDERED that Plaintiff's motion to dismiss is granted solely to the extent that the First and Third Affirmative Defenses are dismissed.

11/12/2021
DATE

SHAWN KELLY, 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