Wolf Haldenstein Adler Freeman & Herz LLP v 270 Madison Ave. Assoc. LLC
2021 NY Slip Op 32419(U)
November 22, 2021
Supreme Court, New York County
Docket Number: 652297/2021
Judge: Barry Ostrager

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. BARRY R. OSTRAGER** **PART IAS 61EF**

Justice

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WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP,

Plaintiff,

- v -

270 MADISON AVENUE ASSOCIATES LLC, and INDEPENDENCE 270 MADISON LLC,

Defendants.

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DECISION AFTER TRIAL

HON. BARRY R. OSTRAGER

The fact pattern in this case is exquisitely simple, and it is baffling to the Court why the parties spent the months of April, May, June, July, August, and September 2021 engaging in protracted, scorched-earth discovery only to produce a trial transcript of approximately 200 pages (including extensive colloquy with the Court) which confirmed what was apparent at the earliest stages of the preliminary briefing in this case in April 2021. The trial of this action concluded on October 29, 2021.

For the reasons that follow, the Court finds in favor of Plaintiff on its First, Second, Third and Fourth causes of action and against the Defendants on their First, Second, and Third Counterclaims. The Court withdraws so much of its decision of September 28, 2021 as dismissed Defendants' Fourth Counterclaim as duplicative of its breach of contract claim and finds in favor of the Defendants on their Fourth Counterclaim for unjust enrichment.

Plaintiff Wolf Haldenstein Adler Freeman & Herz LLP (the "Tenant") has been a tenant at 270 Madison Avenue, New York, New York since 1923. Prior to the commencement of this litigation, the Tenant had an amicable relationship with 270 Madison Avenue Associates LLC and Independence 270 Madison LLC (collectively the "Landlord"). Trial Tr. at 133, 138. There

came a time when the parties agreed that the Landlord would make necessary renovations on the 9th and 10th floors of the building, and on April 20, 2018, the parties entered into the Sixth Lease Modification Agreement ("Sixth Lease Amendment") to a long-form lease (NYSCEF Doc. No. 177) between the parties which extended the term of the lease from April 1, 2019 through and including July 31, 2031, and contained the following material terms primarily in paragraph ¶ 3:

1. The Landlord would perform a substantial renovation of the 9th and 10th floors;

2. While the renovations were ongoing, Wolf Haldenstein would temporarily relocate to the 11th and 13th floors, which the Landlord intended to renovate after the Tenant vacated that space;

3. During the renovation of the 9th and 10th floors, Wolf Haldenstein would pay fixed rent for the 11th and 13th floors and no rent on the 9th and 10th floors until the Landlord's work on the 9th and 10th floors was "substantially complete";

4. Upon moving into the 9th and 10th floors after the work on the 9th and 10th floors was "*substantially complete",* Wolf Haldenstein would resume its tenancy on the 9th and 10th floors at a fixed rent (except for four months of free rent, two following Landlord's completion of the renovations plus May and June of 2020);

5. If the Landlord did not achieve substantial completion of the Landlord's work by February 29, 2020, Wolf Haldenstein would receive a day for day rent credit against fixed annual rent. If the work was not completed by April 30, 2020, the Tenant would receive increased rent credits equal to one and one-half additional days of fixed annual rent for each day thereafter until the Landlord's work was substantially complete.

The Landlord's agreement to renovate the 9th and 10th floors was an inducement to the Tenant to extend its lease on floors at 270 Madison Avenue that the Tenant had rented for decades. The Sixth Lease Amendment expressly provides in ¶ 4 that the Tenant's obligation to pay base rent (but not additional rent) on floors 9 and 10 is waived "for the period April 1, 2019 through the day immediately preceding the day that Landlord's Work has been substantially

completed. . .". Paragraph 2(a) of the Sixth Lease Amendment provides in relevant part (with emphasis added) that:

> *As to any construction performed by any party, "substantial completion" or "substantially completed" means that such work has been completed, as reasonably determined by Landlord's architect*, in accordance with (a) the provisions of the Lease, as modified hereby, applicable thereto, (b) the plans and specifications for such work, and (c) all applicable laws and regulations, except for minor details of construction, decoration and mechanical adjustment, if any, the noncompletion of which does not materially interfere with the Tenant's use of the Premises for the conduct of its business.

The summary judgment record in this case established that the Landlord's work was not substantially complete when the Tenant reoccupied the 9th and 10th floors because the Landlord's architect had never confirmed that the Landlord's work was substantially complete (*see* mot. seq. nos. 005 and 006). Since the Landlord's architect did not confirm that the Landlord's work was substantially complete, the Court granted partial summary judgment for the Tenant on its First Cause of Action for a declaratory judgment, finding as a matter of law that the Landlord had failed to substantially complete the work on the 9th and 10th floors (NYSCEF Doc. No. 297). The Court denied summary judgment on the issue of whether the Tenant had waived the substantial completion requirement by resuming occupancy of the 9th and 10th floors and reserved all other remaining issues for trial.

The trial was conducted on Microsoft Teams with all direct testimony presented by affidavit except for the testimony of non-party David McAlpin, the Landlord's highly credentialed and experienced architect. Mr. McAlpin had also done work for the Tenant. Nearly half of the trial transcript consisted of the direct, cross and redirect examinations of Mr. McAlpin. Trial Tr. 3-87. The utterly pointless examinations of David McAlpin confirmed and reconfirmed that Mr. McAlpin never certified that the Landlord's work was substantially complete because there were significant issues with the HVAC system that was a significant

portion of the renovation. *See, e.g.*, Trial Tr. at 8-11. Mr. McAlpin was not asked a single question about the issues that were not resolved by the Court's decision granting the Tenant partial summary judgment. In all events, the Court found Mr. McAlpin's testimony to be entirely creditable.

Thereafter, Mark C. Rifkin, Esq., the managing partner of the Tenant law firm, testified to the same effect for most of the balance of the trial. Trial Tr. at 87-140, 146-190. While Mr. Rifkin, an experienced commercial litigator, was unnecessarily combative and evasive during his testimony, the Court credits his basic assertion that the Landlord's work was not substantially complete when the Tenant reoccupied the 9th and 10th floors. Mr. Rifkin credibly testified in his direct testimony affidavit and at the trial that the defects in the HVAC system first became apparent to him and his law firm when the law firm Tenant commenced reoccupying the space in December 2019 and January 2020. By letter dated December 30, 2019 (Trial Ex. 43) the Tenant put the Landlord on notice of the Tenant's concerns. Mr. Rifkin further testified, and the Court credits his testimony, that the Landlord both failed to fully honor its undertaking to complete the Landlord's work and that the Landlord commenced demolition of the 11th and 13th floors in early February 2020, rendering it impossible for the Tenant to return to the 11th and 13th floors. Significantly, Mr. Rifkin admitted that since reoccupying the 9th and 10th floors, the Tenant has subleased portions of the 9th and 10th floors to nine different sub-tenants and has advertised the entire 10th floor for a sublease. Of course, with the onset of COVID-19 in March 2020, the parties were and remain at a stalemate, although Mr. Rifkin concedes that the Landlord has attempted to resolve certain deficiencies in the work on the demised floors. The Landlord, of course, could have entirely resolved this dispute by remediating the deficiencies in the Tenant's HVAC system.

The remaining trial witnesses, including a purported HVAC expert who testified on behalf of Plaintiff, added no testimony meaningful to the resolution of the issues in this case.

In short, the testimony adduced at trial established that the Tenant took steps to occupy the 9th and 10th floors in December 2020 and January 2021 to accommodate the Landlord's desire to renovate the 11th and 13th floors. Trial Tr. at 112:15-17; 113-116; 124:221-23. The move to the 9th and 10th floors took time, and the credible evidence established that the HVAC system on the 9th and 10th floors was, in the words of James Caseley, Executive Managing Director of Landlord's agent ABS Partners Real Estate, LLC ("ABS"), in a memo to George Alachouzos, the construction manager for ABS, a "disaster." *See* Trial Ex. 16, including the attached letter to Mr. Caseley from Mr. Rifkin dated February 13, 2020.

There was no evidence presented that the Tenant had waived any of its rights under the Sixth Lease Amendment. The evidence adduced at trial established that the Tenant had explicitly maintained and sought to effectuate its rights under the Sixth Lease Amendment. When the Tenant withheld rent because of the defects in the HVAC system, the Landlord served a Notice to Cure which precipitated the Tenant's request for a *Yellowstone* injunction and, ultimately, this trial on the merits.

Contrary to Landlord's claims, the Tenant at all times reasonably expected (and, indeed demanded) that the Landlord provide the agreed upon contractual benefits of (1) a functional heating and air conditioning system; (2) a determination of substantial completion by the Landlord's architect; and (3) contractual rent credits pending a determination of substantial completion, as set forth in the Sixth Lease Amendment. (Rifkin Tr. Aff. 53-95). The evidence adduced at trial established that the Tenant never waived its rights, as it consistently and explicitly insisted on performance before, during, and after its return to the 9th and 10th floors. However, by occupying and subleasing significant portions of the spase for the last last 18 plus months, the Tenant cannot recover the additional rent credits. Consistent with the holding of *Free People of PA LLC v. Delshah 60th Ninth, LLC*, 169 AD3d 622 (1st Dep't 2019), the Court finds that under all relevant circumstances, while the Tenant is entitled to the waiver of monthly base rent,

the Tenant is not entitled to any of the additional day-by-day rent credits for which provision is made in the Sixth Lease Amendment because such rent credits would constitute an unenforceable penalty. The reality is that the Tenant has utilized the space, sublet the space, and is offering the entire 10th floor for sublease.

The Tenant is also not entitled to any damages beyond certain protections contained in the parties' agreement. Specifically the Tenant is limited to relief from the obligation to pay base rent until the Landlord's work on the 9th and 10th Floors is substantially complete.

The Court rejects the Landlord's argument, based on Section 2.4 of the original Lease, that upon the Tenant's resumption of possession of the 9th and 10th floors, the Tenant shall be deemed conclusively to have agreed that the Landlord has performed all of its obligations under this Lease up to the time of such possession and that the Premises are in satisfactory condition as of the date of such possession. The clear and unambiguous provisions of the Sixth Lease Amendment, which require a finding of "substantial completion" by the Architect are inconsistent with, and supersede, Section 2.4 of the original Lease. Therefore, the Tenant's resumption of possession is not dispositive. Nor is it reasonable to infer from the Architect's preparation of a punch list, or his certification of the contractor's payment invoice, that the Architect was making a finding of "substantial completion" based on the unambiguous procedures set forth in the Sixth Lease Amendment that condition the Tenant's rent obligations on the Architect confirming that the work was "substantially complete" in the Tenant's space. While the Landlord succeeded, albeit barely, in defeating summary judgment on the waiver claim, the Landlord adduced no credible evidence of waiver.

The Landlord established that the Tenant collected rent from as many as nine subtenants during and after re-entering the 9th and 10th floors. To the extent the Court is relieving the Tenant from its obligation to pay rent, all rents collected by the Tenant from subtenants

constitutes the unjust enrichment of the Tenant, and the Court therefore finds in favor of the Landlord on its Fourth Counterclaim. The Tenant has advertised the sublet of the entire 10th floor but, as of October 29, 2021, the 10th floor has not been subleased. The Tenant is directed to account to the Landlord for the rents collected from sub-tenants from January 2020 to date and remit those sums to the Landlord.

At the commencement of these proceedings the Tenant stipulated to pay "use and occupancy" for the 9th and 10th floors without prejudice, in exchange for an October 1, 2021 trial date, which was interrupted for two weeks by reason of a long-scheduled vacation by the Landlord's lead counsel (NYSCEF Doc. No. 23). The Tenant has paid use and occupancy through November 30, 2021. The Tenant is entitled to a credit for those use and occupancy payments, even though the Landlord's acquiescence to the October 1, 2021 trial date was "under protest."

The Tenant is the prevailing party herein, and pursuant to Section 27.1 of the Lease the Court will award the Tenant attorneys' fees, costs and expenses reasonably incurred in this litigation, reduced to reflect the circumstance that the Landlord prevailed on its Fourth Counterclaim. Prior to the trial there were no less than seven discovery/status conferences and a half a dozen Orders to Show Cause in this case with more than 300 docket entries. Hundreds of thousands of pages of documents were exchanged and close to a dozen or more depositions of party and non-party witnesses were conducted. There was also an emergency appeal to the Appellate Division by the Landlord, which was denied.

The Landlord is entitled to have the opportunity to challenge the Tenant's claim for $301,504.38 in attorney's fees, which it may do by submitting an Affirmation within twenty days of the date of this decision. But, it bears noting that, rather than opt for an expedited *Yellowstone*

hearing early on in this case, multiple initiatives by the Landlord during the case unduly protracted these proceedings and consumed an inordinate amount of judicial and party resources. The Tenant is also not without fault in requiring the expenditure of unnecessary judicial and party resources in this case which sophisticated parties should have consensually resolved long ago.

The parties are directed to each prepare a Proposed Judgment, including specific dollar amounts, reflecting the Court's opinion after trial, subject to any consensual agreement the parties may reach.

Accordingly, it is hereby

ADJUDGED, based on Plaintiff's First Cause of Action, that (a) Plaintiff is not in default of the Lease as alleged in the Notice to Cure; and (b) Plaintiff has no obligation to pay rent unless and until after Landlord's architect, FMA, reasonably determines that the Landlord's work under the Lease is substantially complete; and (b) the Notice to Cure is a nullity, of no further force and effect; and it is further

ORDERED, based on the Plaintiff's Second Cause of Action, that Defendant is enjoined from instituting any proceeding against Plaintiff based on the Notice to Cure; and it is further

ORDERED, based on Plaintiff 's Third Cause of Action, that Landlord is directed to specifically perform its obligations relating to the installation of a working HVAC system, but that Tenant is not entitled to any additional rent credits beyond the waiver of monthly base rent, because giving due consideration to the nature of the contract and all relevant circumstances, the additional rent credit provision in the Sixth Lease Amendment constitutes an unenforceable penalty; and it is further

ORDERED that based on the Fourth Cause of Action, Plaintiff is entitled, pursuant to Article 27 of the Lease, to recover of Defendant a sum of money to be determined by the Court, for the reasonable attorneys' fees, costs, and disbursements incurred by Tenant herein; and it is further

ORDERED that Defendant's First, Second and Third Counterclaims are dismissed; and it is further

ORDERED that on Defendant's reinstated Fourth Counterclaim for unjust enrichment, Defendant is entitled to recover any sums Plaintiff has collected or will collect from subleases until the Tenant resumes paying the full rent to the Landlord.

Dated: November 22, 2021