Metropolitan Transp. Auth. v Penny Port, LLC

2023 NY Slip Op 33199(U)

September 8, 2023

Supreme Court, New York County

Docket Number: Index No. 650724/2019

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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METROPOLITAN TRANSPORTATION AUTHORITY, acting by and through METRO-NORTH COMMUTER RAILROAD COMPANY, Index No. 650724/2019

Plaintiff

- against - DECISION AND ORDER

PENNY PORT, LLC, PETER H. GLAZIER, LOIS P. GLAZIER, and MATTHEW GLAZIER,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiff landlord moves for summary judgment on plaintiff's claim for arrears in rent and additional rent from February 2018 to January 3, 2019, and dismissing the affirmative defenses and counterclaims by defendant tenant Penny Port, LLC, and the guarantors of its obligations under the parties' lease, the three Glazier defendants. C.P.L.R. § 3211(b), 3212(b). The parties agree that a fire rendered the leased premises, a restaurant and bar in Grand Central Terminal, New York County, at least partially untenantable for part of the last year of the lease term ending December 31, 2018. Articles 10.1 and 10.2 of the lease required an abatement of rent to the extent the premises were rendered untenantable and required defendant tenant to use reasonable diligence to restore the premises. Plaintiff contends that it provided an abatement, but defendants contend that it was

not proportionate to either the percentage of space that was untenantable or the percentage of usage that was eliminated, as parts of the space generated more income than other parts. For example, if the kitchen was unusable, it rendered the dining area unusable, even if the latter area was undamaged. The lease does not specify how untenantability is to be measured.

Plaintiff further contends that defendant tenant did not diligently or substantially complete restoration before the lease term expired. Defendants, on the other hand, contend that plaintiff breached Article 6.1 of the lease by unreasonably refusing to consent to repairs and demanding that defendant tenant replace equipment that could be repaired, install new equipment, and make improvements to the premises beyond restoring them to their condition before the fire, at extraordinary and unnecessary cost.

I. PLAINTIFF'S CLAIM AND DEFENDANTS' COUNTERCLAIMS

Plaintiff insists that these issues bear only on the amount of rent and additional rent for which defendants are liable, but, because defendants raise a question regarding plaintiff's breach of the lease by unreasonably withholding consent to repairs, such a breach would preclude plaintiff's recovery for defendants' breach of the lease by failing to pay rent and additional rent. Alloy Advisory, LLC v. 503 W. 33rd St. Assocs., Inc., 195 A.D.3d 436, 436 (1st Dep't 2021). Defendants also suggest that, if the

premises were totally untenantable during the period for which plaintiff seeks rent and additional rent, and defendant tenant used reasonable diligence to complete restoration, but was unable to do so before the end of the lease term, defendants owe plaintiff nothing. Defendants do not dispute plaintiff's showing, however, that defendant tenant kept the bar area of the premises open for business throughout the lease term.

Defendants counterclaim for damages based on plaintiff's negligent causation of the fire by failing to clean and maintain duct work outside the leased premises. Article 10.2 of the lease bars damages for injury to defendant tenant's business caused by plaintiff's acts or omissions. Article 15.3 of the lease bars damages for injury to defendant tenant's personal property, such as its equipment and furnishings, and including lost business, specifically resulting from plaintiff's construction or other work activity, alterations, improvements, or repairs. While this provision covers injury to defendant's personal property as well as to its business, a question remains whether plaintiff's failure to maintain duct work amounts to affirmatively negligent repair, as opposed to an omission, which this provision does not cover.

Finally, Article 12.2 of the lease bars damages for injury to defendant tenant's personal property specifically resulting from fire, unless caused by plaintiff's gross negligence or

intentionally tortious acts. Defendants allege plaintiff's intentionally tortious acts, but only regarding its obstruction of repairs in response to the fire, not regarding its causation of the fire.

Although Articles 10.2 and 12.2 cover plaintiff's acts and omissions, New York General Obligations Law (GOL) § 5-321 renders all three lease provisions unenforceable to the extent they exempt plaintiff from liability for plaintiff's own negligence. Munsey v. Sindone, 147 A.D.3d 687, 688 (1st Dep't 2017); Oduro v. Bronxdale Outer, Inc., 130 A.D.3d 432, 433 (1st Dep't 2015). See Mahon v. David Ellis Real Estate, 165 A.D.3d 600, 601 (1st Dep't 2018); Hong-Bao Ren v. Gioia St. Marks, LLC, 163 A.D.3d 494, 496 (1st Dep't 2018). Defendant tenant's obligation under the lease to restore the premises may preclude a claim for the restoration costs, but at minimum does not preclude claims for personal property damage and damage to business caused by plaintiff's negligence independent of its breach of the lease. Plaintiff's negligence that defendants claim is its failure to clean and maintain the duct work, causing the fire. Plaintiff's breach of the lease that defendants claim is its unreasonable withholding of consent to the repairs needed to restore the premises. Plaintiff does not conclusively negate either claim.

Article 30.3 of the lease bars damages for failing to consent to repairs, but does not bar such a breach of the lease

as a defense to plaintiff's claim for defendant's breach of the lease's rent obligations. Moreover, Article 30.3 expressly permits damages if plaintiff's withholding of consent was in bad faith. Defendant Peter Glazier's affidavit alleges the requisite bad faith in plaintiff's deliberate efforts to prohibit repairs; to keep defendants' restaurant closed; and to insist on capital improvements beyond the lease's requirements, to attract a successor tenant at a higher rent: in sum, to render reopening the restaurant by defendant tenant impossible.

Defendants' claim that plaintiff breached the covenant of good faith and fair dealing implied in the lease may duplicate their claim for breach of the lease. New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 318 (1995); Rosetti v. Ambulatory Surgery Ctr. of Brooklyn, LLC, 125 A.D.3d 548, 549 (1st Dep't 2015); Mill Fin., LLC v. Gillett, 122 A.D.3d 98, 104-105 (1st Dep't 2014); Netologic, Inc. v. Goldman Sachs Group, Inc., 110 A.D.3d 433, 434 (1st Dep't 2013). Nevertheless, since plaintiff vigorously disputes its breach of Article 6.1, the court denies dismissal of the claim for breach of the covenant of good faith and fair dealing in the event defendants' counterclaim for breach of Article 6.1 ultimately fails.

For all the reasons explained above, the court denies plaintiff's motion for summary judgment on its claim for breach of the lease and summary judgment dismissing defendants' first

counterclaim for breach of the lease and second and third counterclaims for negligent or intentional injury to defendant tenant's personal property or business. C.P.L.R. § 3212(b).

II. DEFENDANTS' AFFIRMATIVE DEFENSES

Plaintiff's negligence, however, is not a defense to plaintiff's claim for rent and additional rent, but is only the basis for a counterclaim. Even were plaintiff's action in retaliation for a prior action that defendants commenced against plaintiff, and such retaliation formed the basis for a counterclaim or separate action by defendants, neither would such retaliation be a defense to this action. Therefore the court grants plaintiff's motion for summary judgment dismissing defendants' second, third, and fourth affirmative defenses that allege plaintiff's negligence and their ninth affirmative defense that alleges its retaliation. C.P.L.R. §§ 3211(b), 3212(b) and (e).

Moreover, even if defendants recover on their counterclaims for plaintiff's negligence, that recovery does not negate plaintiff's claim under the lease, which in Article 4.1 provides that defendant tenant is to pay plaintiff rent and additional rent "without setoff." Aff. of Tom Onorato Ex. 1. Therefore the court grants plaintiff's motion for summary judgment dismissing defendants' fifth affirmative defense that alleges a setoff. C.P.L.R. §§ 3211(b), 3212(b) and (e).

Plaintiff owed no duty to its commercial tenant to mitigate plaintiff's damages from the tenant's nonpayment of rent and additional rent, 172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Assn., Inc., 24 N.Y.3d 528, 535 (2014); Holy Props. Ltd., L.P. v. Kenneth Cole Prods., 87 N.Y.2d 130, 134 (1995); BP 399 Park Ave. v. Pret 399 Park, Inc., 150 A.D.3d 507, 509 (1st Dep't 2017), and could not mitigate damages as long as the tenant occupied the leased premises, which is the only period for which plaintiff claims rent and additional rent. Nor does the equitable doctrine of unclean hands apply to plaintiff's legal claims for monetary damages. Therefore the court grants plaintiff's motion for summary judgment dismissing defendants' seventh affirmative defense that alleges plaintiff's failure to mitigate its damages and their eighth affirmative defense that alleges its unclean hands.

Since defendants rely at least in part on lease provisions such as Article 6.1 for defendants' defense to plaintiff's claim, the court denies plaintiff's motion for summary judgment dismissing defendants' sixth affirmative defense that documentary evidence bars plaintiff's claim. C.P.L.R. §§ 3211(b), 3212(b). As defendants may defend against plaintiff's claim successfully based on its breach of Article 6.1, the court denies plaintiff's motion for summary judgment dismissing defendants' first affirmative defense that plaintiff fails to state a claim.

C.P.L.R. §§ 3211(b), 3212(b).

III. CONCLUSION

In sum, the court grants plaintiff's motion for summary judgment dismissing defendants' second through fifth and seventh through ninth affirmative defenses, but otherwise denies plaintiff's motion. C.P.L.R. §§ 3211(b), 3212(b) and (e).

DATED: September 8, 2023

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C