

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 4

HOME DEPOT U.S.A., INC.,
Plaintiff,
- against -
168TH STREET JAMAICA LLC,
Defendant.

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INDEX NO. 29966/07

MOTION SEQ. NO. 1

BY: GRAYS, J.

DATED: FEBRUARY 22, 2010

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Defendant 168th Street Jamaica LLC has moved for summary judgment dismissing the complaint against it.

Defendant 168th Street Jamaica LLC (the defendant landlord) holds a leasehold interest in a three-acre parcel of real property located at 168th Street and Archer Avenue, Jamaica, New York. On June 28, 2005, the defendant landlord entered into a twenty-year ground sublease for the property with plaintiff Home Depot USA, Inc. which intended to construct a new store.

Pursuant to section 22.1 of the ground sublease, Home Depot conditioned its acceptance of possession upon the defendant landlord's completion of certain improvements to the property, which in 2005 had several old buildings covering approximately half of the property. The improvements included (1) the demolition and removal of the old buildings and their foundations, (2) the removal of hazardous substances located on or under the

premises, (3) the crushing of demolition materials on the site to Home Depot's specifications, and (4) the rough grading of the soil in accordance with the landlord's work plans and with the requirement that "[a]ny fill used in such grading shall be of suitable materials for the purchaser's [Home Depot's] intended use of the area ***."

The defendant landlord obligated itself to make the improvements at its "sole cost and expense" in accordance with work plans and specifications incorporated into the lease. The landlord warranted that "[a]ll such Landlord's work shall be done in a good and workmanlike manner in accordance with the provisions of this Lease, all Requirements and in conformance with the Approvals."

Home Depot alleges that in order to construct its store without experiencing differential settlement and problems with the foundation, the defendant landlord had to prepare the site with a uniformly fine fill having no organic matter or buried structural elements. The parties entered into a series of amendments to the lease, the second of which incorporated a document captioned "Construction Specifications," providing that "[o]n-site processed fill materials shall consist of sand, gravel, crushed stone, or a mixture thereof and shall contain not more than a de minimus quantity of organic matter." The specifications also required the fill material to consist of particles not exceeding a certain size. The Construction Specifications further provided that "[a]ll fill materials shall be tested by Home Depot's Geotechnical Engineer in accordance with the requirements of the Building Code of the City of New York. The suitability for reuse of existing onsite fill, native soils, or site

processed materials shall be at the discretion of Home Depot's Geotechnical Engineer based on the results of appropriate laboratory testing."

The defendant landlord hired two contractors, Gramercy Wrecking & Environmental Contractors and Racanelli Construction, to make the improvements, and they began their work in September, 2005 by demolishing the old buildings and searching for underground storage tanks. The defendant landlord alleges that as the demolition proceeded, Gramercy Wrecking encountered several concrete foundation slabs below the level at which the plaintiff intended to construct its foundation and that the contractor obtained oral permission from Kim Becker, Home Depot's project manager, to just crack the slabs to permit water drainage instead of removing them from the site. Katherine McGlade, the Senior Vice President of one of the partners comprising the defendant landlord, swears: "Kim Becker authorized Gramercy to merely crack these slabs to assist with water drainage rather than to undertake the expense of removing them from the premises." On the other hand, Becker swears flatly in an affidavit: "I *** did not have any discussions with any of the Landlord's representatives about leaving cracked slabs in place on the site and backfilling soil over the slabs."

On October 25, 2005, Gramercy Wrecking crushed a sample of demolition materials which ATC Associates, Inc, a firm of geotechnical engineers hired by Home Depot, tested and, according to the plaintiff, found to be non-compliant with project specifications. While Home Depot alleges that it informed the landlord that the sample contained too much

organic material, on the other hand, the defendant landlord alleges that on November 9, 2005, Home Depot confirmed in writing that the sample had been approved. ATC went to the project site nine times during the crushing phase, sending to Kim Becker field reports for each of its visits. According to the defendant landlord, from October, 2005 to December, 2005, the plaintiff and its agents never informed it or its contractors that the work had not been done satisfactorily. At the conclusion of the crushing phase, ATC tested another sample of crushed material on December 5, 2005 with satisfactory results.

William Carty, a division manager for ATC, alleges that company employees “were observers only and were not on the site to direct the activity or instruct the contractors.” He further alleges that his company only sent one or two employees to the site on an infrequent basis and that because they were not able to “effectively monitor all of the activity across the 3 acre site, ATC in no way approved or ratified the work conducted by 168th Street Jamaica’s contractors.” Furthermore, the sublease, the landlord’s work plans, and the contract specifications do not obligate Home Depot to monitor the landlord’s work.

On or about December 27, 2005, Katherine McLade sent Home Depot a letter pursuant to Article XXII of the ground sublease representing that the landlord had “substantially completed” its work. Relying on the letter, Home Depot accepted possession of the premises on January 1, 2006.

On May 8, 2006, B. R. Fries & Associates, the general contractor hired by Home Depot, began excavations at the site only to discover that the soil on the site was not

in a satisfactory condition. On May 10, 2006, ATC went to the site to monitor the excavation work and observed the removal of large rocks, bricks, organic material, concrete footers, steel pipes, and broken concrete masonry units. On May 23, 2006, Home Depot served a notice of default upon the defendant landlord alleging that the site contained a large amount of unsuitable material in violation of the sublease, the landlord's work plans, the construction specifications, and the landlord's certification letter. Tectonic Engineering and Surveying Consultants, PC., another expert company retained by Home Depot, conducted daily geotechnical evaluations, and on June 6, 2006, the company issued a report based on borings and tests which concluded that the ground had not been prepared in accordance with project specifications.

On June 9, 2006, B.R. Fries began to bring its own fill material, inspected by Tectonic, to the site and to store it in an area separate from the unsuitable material left by the defendant landlord's contractors. From late June, 2006 to early August, 2006, B.R. Fries allegedly excavated from the site organic material, contaminated soil, pieces of concrete, underground storage tanks, asbestos, and lead tiles. Home Depot served a supplemental notice of default upon the defendant landlord concerning the presence of "significant amounts of organics, wood, metal, and other debris," foundations, slabs, and underground storage tanks.

Home Depot allegedly spent \$3,253,960.77 to bring the project site into compliance with contract specifications and also experienced a three-month delay in the

construction of its new store. The plaintiff began the instant action on or about May 7, 2007, asserting three causes of action, the first for breach of the sublease, the second for negligence, and the third for breach of warranty.

The court turns first to the cause of action for breach of the sublease. “[T]he 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 Hospital*, 68 NY2d 320, 324.) The defendant landlord successfully carried this burden. First, the defendant produced evidence that it relied in good faith on ATC’s inspection and approval of the crushed materials for Home Depot. As to the compliance of the fill’s particle size and organic content with contract specifications, the defendant produced evidence that Home Depot waived its objections or became subject to an estoppel by having ATC repeatedly test crushed samples without making complaints. A party may be foreclosed from demanding strict compliance with a contract by conduct amounting to a waiver or estoppel. (*See, Hilltop Village Co-op. #4, Inc. v Kessler*, 15 AD2d 957; *Caisse Nationale de Credit Agricole v CBI Industries, Inc.*, 90 F3d 1264.) All provisions of a contract are subject to waiver (*see, Madison Ave. Leasehold, LLC v Madison Bentley Associates LLC*, 30 AD3d 1, 6), and a party may waive a default in the performance of a contract. (*See, Tibbetts Contracting Corp. v O & E Contracting Co.*, 15 NY2d 324; *Scavenger, Inc. v GT Interactive Software, Inc.*, 273 AD2d 60.) As for equitable estoppel, the doctrine operates to prevent the unjust

enforcement of rights against a person “who, in justifiable reliance upon the opposing party’s words or conduct, has been misled into acting upon the belief that such enforcement would not be sought ***.” (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184; *see, Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 893.) Second, the defendant landlord produced evidence that Kim Becker, the plaintiff’s project manager, consented to leaving the old foundations in the soil at a depth which the new foundation would not reach.

The burden on this motion shifted to plaintiff Home Depot to produce evidence showing that there is a genuine issue of fact which must be tried. Home Depot successfully carried this burden. There is evidence in the record that Home Depot did not waive clauses in the contract requiring the fill to meet certain specifications and did not become subject to an estoppel in regard thereto. Home Depot made a showing that ATC was not responsible for monitoring the defendant landlord’s work during the course of construction and that ATC was not on the site frequently enough to observe most of the demolition and construction conducted by Gramercy Wrecking. Under all of the circumstances of this case, there are issues of fact pertaining to whether Home Depot waived strict compliance with contract specifications or became subject to an estoppel in regard to the specifications. (*See, Schapfel v Taylor*, 65 AD3d 620; *Reade v Block 247, LLC*, 20 AD3d 448; *Korin Group v Emar Bldg. Corp.*, 291 AD2d 270.) Home Depot also produced an affidavit from Kim Becker in which he denied authorizing the defendant landlord to leave old foundation slabs buried on the site.

There are issues of fact and credibility concerning whether the contract was orally modified to allow the defendant landlord to leave the old foundation at the site which cannot be resolved on this motion for summary judgment. (*See, Dayan v Yurkowski*, 238 AD2d 541; *T&L Redemption Center Corp. v Phoenix Beverages, Inc.*, 238 AD2d 504; *First New York Realty Co., Inc. v DeSetto*, 237 AD2d 219.) The court notes that despite a clause in a contract precluding oral modification, “an oral modification will be enforced if there is part performance that is unequivocally referable to the modification, and a showing of equitable estoppel ***.” (*Irving O. Farber, PLLC v Kamalian*, 16 AD3d 506; *B. Reitman Blacktop, Inc. v Missirlian*, 52 AD3d 752.) The court notes further that although the lease may have been subject to the Statute of Frauds because of its term, Home Depot may be estopped from denying the effectiveness of an oral modification. (*See, Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792.) In sum, there are issues of fact pertaining to whether the defendant landlord breached the sublease by (1) failing to crush demolition material in compliance with specifications, (2) failing to locate and remove underground storage tanks, (3) failing to remove basement slabs, foundation walls, and concrete footings, and (4) failing to remove wood, other organic material, metal, and debris.

Accordingly, that branch of the defendant landlord’s motion which is for summary judgment dismissing the first cause of action is denied.

The court turns next to the second cause of action which is for negligence in the performance of the contract. A party to a contract cannot sue in tort unless a legal duty

independent of the contract itself has been violated. (*See, Heffez v L & G General Const., Inc.*, 56 AD3d 526; *Sargent v New York Daily News, L.P.*, 42 AD3d 491.) In the case at bar, plaintiff Home Depot failed to adequately allege or demonstrate that the defendant landlord owed it a legal duty independent of a contractual duty and that the defendant landlord breached that independent duty. (*See, Sargent v New York Daily News, L.P., supra.*)

Accordingly, that branch of the motion by the defendant landlord which is for summary judgment dismissing the second cause of action asserted against it is granted.

Turning to the third cause of action, which is for breach of warranty, summary judgment is precluded by issues of fact concerning whether the defendant landlord breached its warranty that “[a]ll such Landlord’s work shall be done in a good and workmanlike manner in accordance with the provisions of this Lease, all Requirements and in conformance with the Approvals.” (*See, Alvarez v Prospect Hospital, supra.*)

Short form order signed herewith.

J.S.C.