2022 WL 334298
Unreported Disposition
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Supreme Court, Bronx County, New York.

Abdul Jalil Titumir, Plaintiff,
v.
Barker Ave. Estates LLC AND ALLERTON TKT LLC, Defendants.

Index No. 33391/19E
|
Decided on February 3, 2022

Attorneys and Law Firms

Counsel for plaintiff: Law Offices of Adey Ojo

Counsel for defendants: McKenzie Law Group, PC

Opinion

Fidel E. Gomez, J.

***1** In this action for, *inter alia*, breach of a non-delegable duty, defendants move seeking an order granting them summary judgment. Saliently, defendants aver that the lease between the parties precludes liability for the alleged water leak in the complaint, such that summary judgment is warranted. Plaintiff opposes the instant motion, procedurally asserting that discovery is not yet complete such that the instant motion is premature. Substantively, plaintiff contends that the portion of the lease upon which defendants rely does not bar liability against defendants, because to the extent it bars liability for defendants' negligence, General Obligations Law § 5-321 renders the relevant portion of the lease unenforceable.

For the reasons that follow hereinafter, defendants' motion is granted.

The instant action is for money damages arising from the failure to maintain a premises. The complaint alleges that the plaintiff and defendants' predecessor in both ownership and interest entered into a commercial lease for the premises located at Store No.7DE, 671 Allerton Avenue, Bronx NY 10467 (Store #7DE), whose term was from December 1, 2007 to November 30, 2022. Plaintiff was a merchant of discount hardware, discount housewares, a paint supplier and a seller of household goods, who would operate a store at Store #7DE. On July 24, 2017, water began to leak from apartments above Store #7DE, causing the store's ceiling to collapse and causing water to enter the store. The water flooded the store causing damage to plaintiff's goods, merchandise, the floor, the electrical wiring, the pipes and the light fixtures. As a result, plaintiff was forced to close the store, causing a loss of business. Plaintiff notified defendants, who after a protracted period of time attempted to fix the leak. Despite the repair, water nonetheless continued to leak into the store. Based on the foregoing plaintiff alleges that defendants failed to comply with their non-delegable duty to maintain and make repairs within Store #7DE (First Cause of Action). Plaintiff also alleges that based on the foregoing, despite having to close the store, he nevertheless continued to pay rent such that defendants breached the implied warranty of quiet enjoyment (Second Cause of Action). Lastly, plaintiff alleges that despite notifying defendants of the water condition within Store #7DE, defendants nonetheless failed to repair the same and then when they made repairs, they failed to ameliorate the condition. As such, plaintiff alleges that defendants were negligent (Third Cause of Action).

Standard of Review

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds* *Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]). Notably, the court can consider otherwise inadmissible evidence, when the opponent fails to object to its

admissibility and instead relies on the same *(Niagara Frontier Tr. Metro Sys. v County of Erie*, 212 AD2d 1027, 1028 [4th Dept 1995]).

***2** Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals, [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case (*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in admissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]), [s]upreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding, not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

Contract Law and Leases

It has long been held that absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Accordingly, courts should refrain from interpreting agreements in a manner which implies something not specifically included by the parties, 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., Inc.* at 475). This approach serves to preserve "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses [and] infirmity of memory" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

***3** The proscription against judicial rewriting of contracts is particularly important in real property transactions, where commercial certainty is paramount, and where the agreement was negotiated at arm's length between sophisticated, counseled business people (*Vermont Teddy Bear Co., Inc.*

at 475). Specifically, in real estate transactions, parties to the sale of real property, like signatories of any agreement, are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose. Absent some indicia of fraud or other circumstances warranting equitable intervention, it is the duty of a court to enforce rather than reform the bargain struck (*Grace v Nappa*, 46 NY2d 560, 565 [1979]).

Leases are nothing more than contracts and are thus subject to the rules of contract interpretation, namely, that the intent of the parties is to be given paramount consideration, which intent is to be gleaned from the four corners of the agreement, and that of course, the court may not rewrite the contract for the parties under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning (*Tantleff v Truscelli*, 110 AD2d 240, 244 [2d Dept 1985]).

In the absence of fraud or other wrongful act, a party who signs a written contract is presumed to know and have assented to the contents therein (*Pimpinello v Swift & Co.*, 253 NY 159, 162 [1930]; *Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *Renee Knitwear Corp. v ADT Sec. Sys.*, 277 AD2d 215, 216 [2d Dept 2000]; *Barclays Bank of New York, N.A. v Sokol*, 128 AD2d 492, 493 [2d Dept 1987]; *Slater v Fid. & Cas. Co. of NY*, 277 AD 79, 81 [1st Dept 1950]). In discussing this long-standing rule the court in *Metzger* stated that [i]t has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them and there can be no evidence for the jury as to his understanding of its terms. This rule is as applicable to insurance contracts as to contracts of any kind.

(*Metzger* at 416 [internal citations omitted]).
Generally, pursuant to GOL § 5-321, a provision in a lease seeking to exempt a party for his own negligence is void and unenforceable as against public policy (*Great N. Ins. Co. v Interior Const. Corp.*, 18 AD3d 371, 372 [1st Dept 2005], *affd*, 7 NY3d 412 [2006]; *Tormey v City of New York*, 302 AD2d 277, 278 [1st Dept 2003]; *Gibson v Bally Total Fitness Corporation*, 1 AD3d 477, 479 [2d Dept 2003]; *Radius, Ltd. v Newhouse*, 213 AD2d 614, 615 [2d Dept 1995]). To be sure, GOL § 5-321 states that

[e]very covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

However, case law has carved an exception to the prohibition described in the GOL § 5-321. Specifically, it is well settled that an indemnification agreement in a lease shall be enforceable even if the lessor seeks to have the lessee indemnify him for his own negligence when the lease is the product of "sophisticated parties negotiating at arm's length," and "have agreed to allocate the risk of liability to third parties between themselves, essentially through the employment of insurance" (*Great N. Ins. Co.* at 372; *see Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 161 [1977]. In explaining why GOL § 5-321 does not apply in the foregoing circumstances, the court in *Hogeland* stated that [t]he legislative history and the statute's express invalidation of any agreement 'exempting the lessor from liability for damages for injuries resulting from the negligence of the lessor' strongly suggests that is was directed primarily to exculpatory clauses in leases whereby lessors are excused from direct liability for otherwise valid claims which might be brought against them by others. It and several parallel provisions prohibit agreements which free landlords (or others in comparable relationships) from all responsibility to a tenant (or others) for negligence; the former are thus compelled at their own peril to retain the incentive to act prudently. It is against this background of declared purpose that the indemnification clauses before us must be considered. So analyzed, Berenson is not exempting itself from liability to the victim for its own negligence. Rather, the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance. Courts do not, as a general matter, look unfavorably on agreements which, by requiring parties to carry insurance, afford protection to the public (internal citations omitted) (*Hogeland* at 160-161). Thus, in both *Hogeland* and *Great N. Ins. Co.,* the lessees were obligated to indemnify the lessors,

even though they had been found negligent *Hogeland* at 158; *Great N. Ins. Co.* at 372).

***4** Discussion

Defendants' motion seeking summary judgment is granted. Significantly, on this record, defendants establish that the lease and rider which bind the parties contains a provision which exempt defendants from any liability arising from the water leak alleged in the complaint. The record also establishes that insofar as this is a commercial tenancy, the lease falls within the ambit of the exception to the rule prescribed by GOL § 5-321, which renders unenforceable a lease provision such as the one in the lease and rider between the parties, which exempts defendants from all liability, which necessarily includes their negligent acts.

In support of the instant motion, defendants submit an affidavit by Arie Weissman (Weissman), defendants' Managing Agent, who states that the lease and rider appended to defendants' motion are true and accurate.

Defendants provide the lease and rider between the parties [1]. The lease is dated November 29, 2007, is between plaintiff and Solomon Management Co., LLC., and is for Store #7DE [2]. Paragraph two of the lease makes plaintiff responsible for the maintenance of the "premises, fixtures, and appurtenances," requiring that plaintiff "make all repairs in and about the same necessary to preserve them in good order and condition." Paragraph thirteen of the lease states that

1 In light of Weissman's affidavit, which establishes the authenticity of the lease and rider, they are before the Court in admissible form. To be sure, leases are nothing more than contracts (*Tantleff* at 244). A contract "has independent legal significance and need only be authenticated to be admissible" (*Brand Med. Supply, Inc. v Infinity Ins. Co.*, 51 Misc 3d 145(A) [App Term 2016]; *All Borough Group Med. Supply, Inc. v GEICO Ins. Co.*, 43 Misc 3d 27, 28 [App Term 2013]; see, *Fairlane Fin. Corp. v Greater Metro Agency, Inc.*, 109 AD3d 868, 870 [2d Dept 2013] ["A private document offered to prove the existence of a valid contract cannot be admitted into evidence unless its authenticity and genuineness are first properly established."]; *NYCTL 1998-2 Tr. v Santiago*, 30 AD3d 572, 573 [2d Dept 2006]).

2 The complaint concedes that the lease and rider in question binds defendants insofar as the instant premises changed ownership after the foregoing documents were executed.

[t]he Landlord shall not be liable for any failure of water supply or electrical current, sprinkler damage, or failure of a sprinkler service, nor for injury or damage to a person or property caused by the elements or by other tenants or persons in said building, or resulting from steam, gas, electricity, water, rain or snow, which may leak or flow form any part of said building, or from pipes, appliances or plumbing works of the same, or from the street or sub-surface, or from any other place nor for interference with light or other incorporeal hereditaments by anybody other than the Landlord, or caused by operations by or for a government authority in construction of any public or quasi-public work, neither shall the Landlord be liable for any latent defect in the building.

***5** The rider is also dated November 29, 2007. Paragraph 13 of the rider reiterates paragraph two of the lease and paragraph 10 of the rider reiterates paragraph thirteen of the lease. Significantly, paragraph 2 of the rider states that

[t]he Tenant shall, at- his own cost and expense, during the whole term of this Lease and of any renewal agreements, have ready before the commencement of this Lease his own fire and liability insurance including the Broad Form Comprehensive Liability endorsement covering the demised premises; general public liability insurance with limits of not less than $750,000 with respect to death or personal injury to any one person and any one occurrence; for bodily injury and property damage, in the amounts not less than $350,000; and shall maintain the same in full force and effect throughout the entire term of this Lease and of any renewal thereof.

Based on the foregoing, defendants establish prima facie entitlement to summary judgment.

Preliminarily, contrary to plaintiff's assertion, he fails to establish that the instant motion is procedurally premature pursuant to CPLR § 3212(f) on grounds that discovery has not yet been completed.

Pursuant to CPLR § 3212(f), a motion for summary judgment will be denied if it appears that facts necessary to oppose the motion exist but are unavailable to the

opposing party. Denial is particularly warranted when the facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Franklin National Bank of Long Island v De Giacomo*, 20 AD2d 797, 797 [2d Dept 1964]; *De France v Oestrike*, 8 AD2d 735, 735-736 [2d Dept 1959]; *Blue Bird Coach Lines, Inc. v 107 Delaware Avenue, N.V., Inc*., 125 AD2d 971, 971 [4th Dept 1986]). However, when the information necessary to oppose the motion is wholly within the control of the party opposing summary judgment and could be produced via sworn affidavits, denial of a motion for summary judgment pursuant to CPLR § 3212(f) will be denied (*Johnson v Phillips,* 261 AD2d 269, 270 [1st Dept 1999]).

A party claiming ignorance of the facts critical to defeat a motion for summary judgment is only entitled to further discovery and denial of a motion for summary judgment if he or she demonstrates that reasonable attempts were made to discover facts which, as the opposing party claims, would give rise to a triable issue of fact (*Sasson v Setina Manufacturing Company, Inc.*, 26 AD3d 487, 488 [2d Dept 2006]; *Cruz v Otis Elevator Company*, 238 AD2d 540, 540 [2d Dept 1997]). Implicit in this rationale is that the proponent of further discovery must identify facts, which would give rise to triable issues of fact. This is because a court cannot condone fishing expeditions and as such, "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson* at 501). Thus, additional discovery should not be ordered where the proponent of the additional discovery has failed to demonstrate that the discovery sought would produce relevant evidence (*Frith v Affordable Homes of America, Inc.*, 253 AD2d 536, 537 [2d Dept 1998]).Notwithstanding the foregoing, CPLR § 3212(f) mandates denial of a motion for summary judgment when a motion for summary judgment is patently premature, meaning when it is made prior to the preliminary conference, if no discovery has been exchanged (*Gao v City of New York*, 29 AD3d 449, 449 [1st Dept 2006]; *Bradley v Ibex Construction, LLC*, 22 AD3d 380, 380-381 [1st Dept 2005]; *McGlynn v Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]). Under these circumstances, the proponent seeking denial of a motion as premature need not demonstrate what discovery is sought, that the same will lead to discovery of triable issues of fact or the efforts to obtain the same have been undertaken (*id*.). In *Bradley*, the court denied plaintiff's motion for summary judgment as premature, when the same was made prior to the preliminary conference (*Bradley* at 380). In *McGlynn*, the court denied plaintiff's motion seeking summary judgment, when the same was made after the preliminary conference but before defendant had obtained any discovery whatsoever (*McGlynn* at 117).

***6** Here, the parties attended a preliminary conference on January 25, 2021, which resulted in an order prescribing discovery that very day. Thus, the instant motion is not premature on grounds that no discovery conferences have yet been held. Moreover, to the extent that plaintiff's sole assertion on this issue is merely that "[d]iscovery has not been completed," he fails to establish, as required, what attempts were made to discover the facts he needs, which are critical to defeat this motion, and which are in defendants' possession (*Sasson* at 488; *Cruz* at 540).

Substantively, defendants establish that the commercial lease between the parties bars any liability as against defendants for the water leak alleged in the complaint. As noted above, leases are nothing more than contracts and are thus subject to the rules of contract interpretation, namely, that the intent of the parties is to be given paramount consideration, which intent is to be gleaned from the four corners of the agreement, and that of course, the court may not rewrite the contract for the parties under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning (*Tantleff* at 244).

Here, paragraph two of the lease and 13 of the rider establish that plaintiff agreed to completely maintain Store #7DE. More significantly, paragraph 13 of the lease and 10 of the rider establishes that with regard to water leaks emanating from pipes within Store #7DE, and causing damage, as alleged in the complaint, defendants would bear no liability whatsoever. Thus, per the clear and unambiguous language of the lease and rider, the instant action is barred.

While it is true that pursuant to GOL § 5-321, a provision in a lease seeking to exempt a party for his own negligence is void and unenforceable as against public policy (*Great N. Ins. Co.* at 372 ; *Tormey* at 278; *Gibson* at 479; *Radius, Ltd.* at 615), it is equally true that an indemnification agreement in a lease shall be enforceable even if the lessor seeks to have the lessee indemnify him for his own negligence when the lease is the product of "sophisticated parties negotiating at arm's length," and "have agreed to allocate the risk of liability to third parties between themselves, essentially through the employment of insurance" (*Great N. Ins. Co.* at 372; *see Hogeland* at 161).

Here, while a fair reading of paragraph thirteen of the lease and 10 of the rider clearly insulates defendants from all liability from the conditions alleged therein, such that liability is barred for their own negligent conduct, paragraph 2 of the rider brings paragraph thirteen of the lease and 10 of the rider within the ambit of the exception to GOL § 5-321. To be sure, insofar as paragraph 2 of the rider mandates that plaintiff purchase insurance insuring it for property damage, it is clear that the parties to this commercial lease sought to allocate plaintiff's risk, the very same for which he sues, to a third-party, namely the insurance company.

Accordingly, defendants establish that even if they were negligent in the maintenance of the Store #7DE, the lease between the parties bars this action (*Great N. Ins. Co.* at 372; *see Hogeland* at 161). By operation of law, this is necessarily true for the second cause of action for breach of the implied warranty of quiet enjoyment, since to hold otherwise, would render paragraph 13 of the lease and 10 of the rider meaningless. Indeed, a violation of the implied warranty of quiet enjoyment would impose the very liability upon defendants that they sought, through negotiation, to avoid.

***7** The Court also holds, as urged by defendants, that the first cause of action, premised on an alleged non-delegable duty requiring defendants to maintain Store #7DE, fails as a matter of law. As noted by the lease and rider, the tenancy at issue is commercial and not residential. As such, the non-delegable duty pleaded by plaintiff and the legal authority for which he never identifies, does not exist. To be sure, while Multiple Dwelling Law § 78(1) states that "[e]very multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair . . . [and that] [t]he owner shall be responsible for compliance with the provisions of this section," Multiple Dwelling Law § 4(4) defines a "dwelling" as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings." Thus, while it is true that the duty imposed by MDL § 78 (1) is non-delegable (*Mas v Two Bridges Assoc. by Nat. Kinney Corp.*, 75 NY2d 680, 687 [1990]), by the express language of the statute, it does not apply to commercial tenancies(*Ortiz v CEMD El. Corp.*, 123 AD3d 463, 464 [1st Dept 2014] ["Multiple Dwelling Law § 78 is inapplicable because the building at issue is not a multiple dwelling but a commercial building."]).

For the same reasons, the New York City Administrative Code does not impose a duty upon defendants to keep a commercial premises such as Store #7DE in good repair. While pursuant to the New York City Administrative Code, "[t]he owner of a multiple dwelling shall keep the premises in good repair" (New York City, NY, Code § 27-2005[a]), NY, Code § 27-2004[a][3] defines a dwelling as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place of one or more human beings."

Nothing submitted by plaintiff in opposition raises an issue of fact sufficient to preclude summary judgment. It is hereby

ORDERED that the complaint be dismissed with prejudice. It is further

ORDERED that defendants serve a copy of this Order with Notice of Entry upon plaintiff within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated February 3, 2022

Bronx, New York

HON. FIDEL E. GOMEZ, AJSC

All Citations

Slip Copy, 2022 WL 334298 (Table), 2022 N.Y. Slip Op. 50073(U)