

95 Van Dam Corp. v V-Dog Home Corp.

2001 NY Slip Op 30084(U)

March 19, 2001

Sup Ct, New York

Docket Number: 100856/98

Judge: Paula J. Omansky

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PAULA J. OMANSKY

PRESENT: _____
Justice

PART 47

95 Von Dam Corp

- v -

V-Dog Home Corp

INDEX NO.

Cs/0885698

MOTION DATE

MOTION SEQ. NO.

08

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Motion denied in accordance with
accompanying memorandum*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/19/01



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X

95 VAN DAM CORP.,

Index No.100856/98

Plaintiff,

DECISION AND ORDER

-against-

V-DOG HOME CORP.,

Defendant.

----- X

V-DOG HOME CORP.,

Third-party Plaintiff,

-against-

BRITISH KHAKI FURNITURE, INC.

Defendant.

----- X

PAULA J. OMANSKY, J.:

Plaintiff 95 Van Dam Corp. moves for an order that defendant V-Dog Home Corp. is collaterally estopped to deny that its failure and refusal to execute the plaintiff's alteration applications constituted a breach of the condominium's by-laws. In addition, plaintiff moves to amend the complaint or to deem the pleading to conform to the proof to add allegations that defendant's breach of the by-laws coupled with the plaintiff's inability to re-rent the basement space constitutes an actionable claim.

Defendant cross-moves, pursuant to CPLR 3212(b), to dismiss plaintiff's complaint on the ground that the fifth and final cause of action for damages has no merit.

FACTS

Plaintiff is the owner of a commercial condominium unit in a

building located on 95 Van Dam Street in Manhattan. Plaintiff's unit consists of the cellar and ground floor of the premises. Defendant is the building's condominium association.

At some point, plaintiff entered into a lease with British Khaki Furniture Inc. ("British Furniture"), the third-party defendant. In March 1997, British Khaki vacated the premises, allegedly because plaintiff failed to provide the promised ventilation system which was essential for proper operation of British Khaki's furniture finishing business. According to plaintiff, defendant failed to properly and timely consider its request to install a ventilation system. Plaintiff maintains that defendant's failure to approve its alteration request lead to British Khaki's decision to quit the premises.

Plaintiff re-rented the ground floor to J Squared. The unvented cellar remained vacant until January 2, 2000, when the space was lease to Herbert Wolf & Company, a non-party, with rent commencing on May 1, 2000 at the rate of \$6,300 per month.

Defendant alleges that plaintiff has suffered no monetary harm because J Squared's monthly rent was higher than the fee charged to British Khaki. The exact amount of J Squared's rent is not stated.

PROCEDURAL HISTORY

In a decision dated May 22, 1998, the Honorable Sheila Abdus-Salaam noted that plaintiff knowingly permitted its commercial condominium unit to be used in violation of the certificate of occupancy for that unit. The original certificate of occupancy for that portion of the premises provided that the first floor was to

be used as a photo studio and that the cellar was to be used for storage. Justice Abdus-Salaam held that this type of usage was consistent with zoning use group 6. However, plaintiff did not sub-lease the premises to a zone 6-type business but instead entered into an agreement with a furniture manufacture which comes under zoning use group 17. Officials from the Department of Buildings said that use group 17 would be permitted and approved a proposed plan for installing a ventilation system. However, the prior court held that there was no evidence that the certificate of occupancy was actually modified by the Board of Standards and Appeals as required by section 645(e) of the New York City Charter.

In a decision dated October 9, 1998, Justice Abdus-Salaam denied plaintiff's motion to renew and for leave to amend the complaint on the ground that Board of Standards and Appeals had not yet modified the certificate of occupancy.

However, the prior court permitted discovery and eventually granted plaintiff's motion to amend the complaint to include a request for declaratory relief and a fifth cause of action for damages. In a decision dated September 15, 1999, Justice Abdus-Salaam also granted plaintiff summary judgment on the second cause of action holding that

discovery has revealed that defendant failed to comply with the condominium's by-laws in rejecting plaintiff's applications by holding board meetings without proper notice to all directors, including plaintiff's principal Mr. Silverstein, as required by Article IV, Section 6 of the By-Laws. Nor did the board obtain waivers from absentee directors. Plaintiff has now demonstrated that defendant's denial of its applications was not the result of a "duly constituted meeting" and thereby ineffective. Thus, since defendant never properly acted in response to

plaintiff's application, much less within the 30 days required by Article VI, Section 14 of the By-Laws, defendant is deemed to have consented to the applications.

Further, since the denial of the initial renewal motion, the Buildings Department has issued a corrected certificate of occupancy ("c of o"), which moots defendant's objections to the applications. In January 1999, this court denied defendant's motion to vacate the new c of o, indicating that such relief be sought through an Article 78 proceeding. However, defendant has not availed itself of this relief and the time to do so has expired.

(September 1999 order, at 1-2). Defendant had not submitted any evidence that it appealed Justice Abdus-Salaam's decision to grant plaintiff summary judgment on the issue of liability.

The remaining claims were eventually transferred to Justice Beatrice Shainswit for trial. On the first day of the trial, Justice Shainswit found a discrepancy between plaintiff's theories of the case and the amended complaint. Noting that events subsequent to the first amendment of the complaint warranted re-pleading, the court directed plaintiff counsel to make a motion conforming plaintiff's pleadings to its proof and theory of the case.

DISCUSSION

Defendant's cross motion to dismiss the fifth cause of action for damages is denied. It is established, as law of the case, that plaintiff's claim is sufficiently plead (Goodstein Contr. Corp. v City of New York, 80 NY2d 366, 371 [1992]). Moreover, defendant may not now collaterally challenge Justice Abdus-Salaam's determination that defendant is liable to plaintiff for any resulting damages. Justice Abdus-Salaam has already ruled, as a

matter of law, that "defendant never properly acted in response to plaintiff's application" and that by this omission defendant "is deemed to have consented to the applications" (September 1999 order, at 1-2). Therefore, plaintiff's motion to bar defendant from submitting evidence on the question of liability is granted.

This court shall also permit pleading to be amended to conform to the evidence and theory of the case (CPLR 3025[c]). Defendant is not prejudiced since plaintiff has claimed from the inception of the action that it was damaged by defendant's delay. Moreover, upon appropriate proof, plaintiff is entitled to recover any damages for sums it has expended in reliance on defendant's obligation that it would timely and in good faith consider plaintiff's application to install a ventilation system (Goodstein Contr. Corp. v City of New York, supra, 80 NY2d, at 372). In addition to any out of pocket expenses, plaintiff is also entitled to damages for lost profits it would have realized if the defendant had not improperly withheld its consent (ibid.).

As to defendant's remaining objections to the amendment, the court shall grant a continuance to permit, where appropriate, limited discovery on the issue of damages claimed in the amended pleading (CPLR 3025[c]). Although a prior court has determined the issue of liability by finding that defendant improperly withheld its consent, that ruling does not bar defendant from challenging the amount of the alleged damages. Plaintiff must still show that the damages are based "upon reliable factors without undue speculation" (Ashland Mgt., Inc. v Janien, 82 NY2d 395, 403 [1993])

and that the damages are directly attributable to defendant's breach (International Systems. A Div. of Interedes (U.S.A.) v Delcrete Corp., 103 AD2d 1008, 1009 [4th Dept 1984]; cf. Halkedis v Two East End Ave. Apartment Corp., 161 AD2d 281, 282-283 [1st Dept] appeal denied 76 NY2d 711 [1990]). Defendant may properly raise a claim that plaintiff is not entitled to any damages for lost profits because it obtained a higher rent from Jay Squared than it was entitled to receive from British Khaki (Wade Lupe Contr. Co., Inc. v B & J Roofing Co., 84 AD2d 615 [3d Dept 1981] affd 55 NY2d 993 [1982]; see, American List Corp. v U.S. News and World Report, Inc., 75 NY2d 38, 44 [1989] [court may consider costs saved by plaintiff as a result of the breach]).

Accordingly, it is

ORDERED that plaintiff's motion to amend the complaint in accordance with CPLR 3025(c) is granted and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further


ORDERED that defendant shall serve a responsive pleading to the amended complaint within 20 days from the date of said service; and it is further

ORDERED that plaintiff's motion to preclude defendant from introducing evidence on the issue of liability is granted; and it is further

ORDERED that defendant's cross motion to dismiss is denied; and it is further

ORDERED that the parties are directed to appear for a ^{pre-} conference on ~~April 20~~²⁰, 2001, at 11:00 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: March 19, 2001



PAULA J. OMANSKY
J.S.C.