

236 W. 40th St. Corp. v Phillipine Am. Lace Corp.

2002 NY Slip Op 30048(U)

October 9, 2002

Supreme Court, New York County

Docket Number: 0113746/2001

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

Justice

236 West 40th St. Corp

INDEX NO. 113746/200

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

Phillipine American Lace Corp.

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

SCANNED
NOV 06 2002

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 10/9/02

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
236 WEST 40TH STREET CORP.,

Plaintiff,

Index No. 113746/01
Mtn Seq. 002

-against-

PHILLIPINE AMERICAN LACE CORP.,

Defendant.

-----X
PHILLIPINE AMERICAN LACE CORP.,

Plaintiff,

-against-

236 WEST 40TH STREET CORP., ORISON
INTERNATIONAL CORP, and KYOO H. LEE,

Defendants.
-----X

WALTER B. TOLUB, J. :

By this motion, Plaintiff 236 West 40th Street Corp. (hereinafter, Landlord) **seeks** to dismiss Defendant Phillipine American Lace Corp.'s (hereinafter, Tenant) complaint pursuant to CPLR 3211(a) and 3212. Landlord additionally seeks a declaration establishing the right to possess the premises and invalidating Tenant's right of first refusal.

The instant action reflects the consolidation of two related cases. In the first action, Landlord's complaint **seeks:** (1) a declaration that 236 West 40th Street Corp. is the Landlord of the subject premises, and that Phillipine American Lace Co. is the Tenant of the second floor of the **subject premises;** (2) a determination of the validity of the purported undated document

extending the lease, and if the lease is invalid, a declaration of the fair market rental value of the premises or; (3) alternatively, that the June 3, 1999 document superceded the undated document, and pursuant to that document, Tenant was obligated to pay fair market rental value for the premises during the lease extension; and (4) as consequential relief, an order directing Tenant to pay Landlord the amount found to be due and unpaid either as use and occupancy or as rent.

In the second action, Tenant's complaint against Landlord and Defendants Orison International Corp. and Kyoo H. Lee (hereinafter Defendant Orison and Defendant Lee) contains eight causes of action. The **first** through third causes of action contain allegations concerning issues of the validity of Tenant's right of first refusal and Landlord's violation of that right. The fourth cause of action alleges breach of Tenant's lease by Defendants Orison and Lee. The fifth and sixth causes of action allege a conspiracy between Landlord and Defendant Orison for the purpose of defrauding Tenant, destroying its property interests and nullifying its right of **first refusal**. The seventh and eighth causes of action allege that Defendant Lee and Defendant Orison interfered with and breached Tenant's lease agreement.

Facts

Since 1999, Landlord has been the owner the building located at 236 West 40th Street in Manhattan ("the building"). Landlord

acquired the building following a series of transactions stemming from a 1988 foreclosure action commenced by the Federal Deposit Insurance Corporation ("FDIC") against Defendant Lee. As a result of this action, on November 3, 1988, FDIC filed a Notice of Pendency with the County Clerk of New York County.

On July 10, 1992, Defendant Lee and Tenant executed a lease for the second floor of the building. Pursuant to this lease, Tenant was to occupy the premises from September 1, 1992 through July 31, 1995. From the papers presented, it appears that in 1994 a letter amending the lease was executed extending Tenant's lease through April 30, 1999¹. On August 29, 1995, pursuant to a second letter amending the lease, Tenant's lease term was extended through December 30, 1999. In this same letter, Landlord gave Tenant the right of first refusal to purchase the building.

In 1996, *by* order of the New York County Supreme Court, Defendant Orison was substituted as Plaintiff in the Foreclosure action commenced by FDIC. On August 6, 1997, Defendant Orison filed the second Notice of Pendency in the Foreclosure Action with the County Clerk's office.

On October 22, 1997, the New York County Supreme Court issued a judgment of foreclosure and sale on the building. By referee's deed dated March 11, 1998 (recorded on December 9, 1999), Solomon Rubin, as Grantor conveyed title to the building to Defendant

¹This document was not included in either set of motion papers.

Orison.

Prior to the end of Tenant's lease in 1999, two documents were created and executed by the parties. One is an undated document that extends the lease through December 31, 2002. The second document, dated June 3, 1999 extends the lease on the second floor through December 31, 2001.

On October 8, 1999, Landlord acquired the building from Defendant Orison. Tenant, believing that its right of first refusal was violated by the conveyance, commenced the instant litigation.

Discussion

Summary Judgment

On a motion for summary judgment, the court's role is strictly limited to finding issues, and not resolving them. The movant's success on the motion is thus dependent on the submission of evidence sufficient to demonstrate an absence of any triable issues of fact, thereby demonstrating entitlement to judgment as a matter of law (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [1957]). Once a showing has been made, the opposing party bears the burden of producing evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring trial. Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient for this purpose (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). If there is any doubt that triable issues of fact exist, then summary judgment will not be granted.

A motion for summary judgment under CPLR 3212 may be brought by any party after issue has been joined. (CPLR 3212 [a]). However, if the motion is brought before the non-moving party has had an opportunity to discover facts necessary to defeat summary judgment, the court has the discretion to deny the motion. (CPLR 3212 (f)). See also Altman, Lipshie and Gertsman; New York Civil Practice Before Trial [James Publishing 2001] § 37:380, § 37:480).

In the instant case, Landlord's motion precedes the filing of a note of issue in this matter. This fact, coupled with statements made by Tenant in its opposition papers², leads this court to believe that discovery in this matter remains incomplete. As Tenant is not yet able to present the necessary facts to defeat this motion for summary judgment, pursuant to CPLR 3212(f), Landlord's motion for summary judgment is denied as premature.

Motion to Dismiss

On a motion to dismiss, accepting all of the allegations of the complaint as true and affording Plaintiff all favorable inferences to be drawn from them, the task of the court "is to determine whether the plaintiff can succeed "upon any reasonable view of the facts stated"" (Campaign for Fiscal Equity, Inc. et al. v. State of New York, 86 N.Y.2d 307 at 318 [1995] citing People v. New York City Transit Authority, 59 N.Y.2d 343 at 348 [1983]).

² (see Defendant's Memorandum of Law In Opposition to Summary Judgment, p. 8)

Each allegation or cause of action must be supported by facts. As such, failure to support a cause of action with adequate evidence, or failure to demonstrate the existence of an element of the cause of action warrants dismissal (see DiPalma v. Phelan, 81 N.Y.2d 754 119921 (complaint in a 51983 action dismissed for failing to establish a federally protected right); Creed v. United Hospital et al., 190 A.D.2d 489 [2nd Dept. 1993] (action for emotional distress dismissed for failure to establish physical trauma)).

In the instant motion, Landlord moves to dismiss Tenant's complaint from the second action presumably under CPLR 3211(a)(7) for failure to state a cause of action. Tenant's complaint, containing eight causes of action, appears to be factually supported by the papers. It is possible, that upon conclusion of adequate discovery and disclosure, Tenant may be able to succeed on their causes of action. Landlord's motion to dismiss Tenant's complaint pursuant to CPLR 3212(a)(7) is therefore denied.

Accordingly, it is

ORDERED that the motion of Plaintiff 236 West 40th Street Corp. ("Landlord") for summary judgment is denied **as** premature; and it is further

ORDERED that the motion of Plaintiff 236 West 40th Street Corp. ("Landlord") to dismiss the complaint of Defendant Phillipine American Lace Corp. ("Tenant") is denied; and it is further

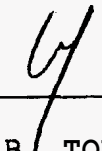
ORDERED that the Clerk of Court enter judgment in favor of

Defendant Phillipine American Lace Corp.

Counsel for the parties are directed to appear for a Compliance Conference at I.A. Part 15, Room 335, 60 Centre Street, New York, New York on December 6, 2002 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/9/02



HON. WALTER B. TOLUB, J.S.C.