

Rusabo 610 LLC v Compass Parking Corp.
2002 NY Slip Op 30067(U)
September 2, 2002
Supreme Court, New York County
Docket Number: 0110570/2002
Judge: Paula J. Omansky
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY
Justice

PART 47

Rusabo 610

INDEX NO. 110570/02

MOTION DATE 8/5/02

MOTION SEQ. NO. 001

MOTION CAL. NO. 2

- v -

Compass Parking

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 _____
SCA ED
OCT 04 2002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/2/02

[Signature]
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

RUSABO 610 LLC, 'and BROADWAY HOUSTON MACK
DEVELOPMENT

Index No. 110570/02

Plaintiff,

DECISION AND ORDER

-against-

COMPASS PARKING CORP.

Defendant.

----- X

PAULA J. OMANSKY, J. :

Motion sequence no. 001 and 002 have been consolidated for disposition. In this action for declaratory relief, concerning the exercise of a cancellation clause in a commercial property lease, defendant Compass Parking Corp. ("Compass"), moves (motion sequence no. 001) to dismiss the complaint on the ground that the pleading fails to state a cause of action (CPLR 3211[a][7]).

Plaintiffs Rusabo 610 LLC ("Rusabo") and Broadway Houston Mack Development LLC ("Broadway Mack") cross-move (motion sequence no. 001) to treat defendant's motion as a an application for summary judgment pursuant to CPLR 3211(c).

Plaintiffs move (motion sequence no. 002), pursuant to CPLR 3211(c), to convert their prior cross application (motion sequence no. 001) to a motion for summary judgment, and to deem defendant's application as an answer to the complaint. Upon conversion to a motion for summary judgment, plaintiff moves (motion sequence no. 002) for summary judgment on its complaint seeking a declaration that plaintiff is entitled to exercise its rights to cancel the

lease and that Compass is obligated to surrender possession of the premises after the redevelopment plans have been approved. In addition, plaintiffs seek a declaration that they are entitled to recover attorneys' fees and expenses herein.

FACTS

Plaintiff Rusabo is the fee owner of real property known as 610-618 Broadway, New York. N.Y., and the structures thereon. The subject property is trapezoid in shape, located on the north side of Houston Street, running the full block (approximately 203 feet) along Houston from Broadway on the west to Crosby street on the east, and extending north from Houston Street approximately 86 feet on the Broadway side, and approximately 46 feet on the Crosby Street side. The lot is occupied by four tenants, each conducting a separate business in a separate and limited portion of the property: a gas station, a car wash operation, an operator of advertising billboards, and an open parking garage with grade-level entrance/exit ramp. Defendant operates the parking garage.

Given the economic development in the area and the need for commercial space in lower Manhattan, Rusabo seeks to redevelop its property by constructing a 7-story building for a mix of retail and office use. According to Rusabo, the result of such construction would be to eliminate parking as a primary use of the property.

To achieve its ends Rusabo and plaintiff Broadway Mack, a contractor/developer, entered into an agreement, dated April 2001,

whereby Broadway Mack would purchase a ground lease of that property. Under paragraph 34 of the proposed ground lease, Broadway Mack is required to construct a new building on the property. Although the terms of the ground lease have been fully negotiated, Broadway Mack has not actually entered into a lease. Instead, Rusabo has granted Broadway Mack an option to take the ground lease for which the latter has paid an undisclosed, but allegedly large, sum of money (the "Ground Lease Option"). However, the only contract in the record between Rusabo and Broadway Mack which can be construed to be a Ground Lease Option is a document entitled "Assignment and Assumption of Leases" which states that the transfer was based on consideration of only \$10.00.

According to plaintiff, the Ground Lease Option is exercisable for a limited time only; and the balance of the purchase price for the full ground lease will be payable upon Broadway Mack's exercise of the option. Once it accepts the full ground lease, Broadway Mack is obligated, within the time frame defined therein, to commence, and thereafter to proceed to construct upon the property.

Plaintiffs state that all leases, with the exception of the car-wash operator which is an affiliate of Rusabo, contain what is commonly referred to as a "cancellation for demolition or construction clause." Defendant Compass entered into a lease with Rusabo on February 11, 1993 (the "Compass Lease"). This lease terminates on August 31, 2007. Paragraph 64 of the Compass Lease

provides:

In recognition of the fact that the Demised Premises forms but a portion of the Overall Premises, and that during the term of this lease (or its renewals or extensions), the Lessor may have the opportunity to redevelop, or change the use of the entire parcel comprising the Overall Premises, the parties agree as follows:

(a) Notwithstanding the other provisions of this Lease, including but not limited to the Lessee's valid exercise of its renewal option, the Lessor shall have the right, upon no less than ninety (90) days prior written notice (to be effective on the last day of a calendar month) to the Lessee, to cancel this Lease, effective upon the cancellation date set forth therein, in the event the Lessor files (and receives approval for) plans to develop or reconfigure the overall premises, the result of which is the elimination of parking as a primary use.

The Compass lease also grants Compass a lower rent than the market rate. In addition, the Compass lease gives Compass the right of first refusal in accordance with subparagraph 64(b)(i) to (v), in the event that the redevelopment involves the future use of all or a portion of the premises as a parking garage. In addition paragraph 18.04 of Broadway Mack's proposed Ground Lease requires that entity to comply with the Compass' rights under the Compass Lease.

Plaintiffs allege that Compass was notified of Rusabo's intention to exercise the cancellation clause in the future. In a letter dated February 26, 2002, the attorney for defendant Compass rejected plaintiffs' position stating:

[w]e have received for review a new draft Hold Harmless Agreement again sent to us by McGraw Hudson Construction

Co. In this instance, access is requested for purported landlord's work as opposed to work by a proposed lessee-developer. We have previously advised you that the subject lease does not permit termination of the lease and development by a lessee-developer. Therefore, our client is concerned because the new certificate of liability insurance named Macklowe Management Co., Inc., the prior potential lessee-developer. Moreover, the address of the McGraw Hudson Construction is the same as that of the aforesaid Macklowe Management Co., Inc.

Inasmuch as it is our client's intention to enforce its rights under the subject lease, it will also permit this work to proceed since the landlord has a right under the lease for access to perform landlord's work. However, please be advised that if this step is an effort to circumvent our client's ultimate leasehold rights, no waiver of rights is intended and our client will oppose any termination of the lease to permit development of the property by any party other than the actual fee owner.

CISCUSSION

Declaratory Action

Plaintiffs are seeking a declaration as to their rights to exercise the option under the Compass lease to terminate Compass' tenancy notwithstanding that redevelopment will be executed by a ground lessee, Broadway Mack, and that Rusabo's right to issue a termination notice may be effectively assigned to Broadway Mack.

Compass argues that such relief is premature since plaintiffs have not actually entered into a binding ground lease.

In New York, the giving of an advisory opinion is not the proper exercise of the judicial function (Cuomo v Long Island Lighting Co., 71 NY2d 349, 350 [1988]). An action may not be maintained if the issue presented for adjudication involves a

future event beyond the control of the parties which may never occur (ibid.). However, this is not the case here. The record shows that the landlord had taken the initial steps to develop the property and intends to enforce the conditional limitation: in the Compass Lease, which, if enforced, will have an immediate and direct impact on the parties' rights (Remsen Apartments, Inc. v Navman, 89 AD2d 1014, 1015 [2d Dept 1982], affd 58 NY2d 1083 [1983]). Defendant Compass has also stated that it shall remain on the premises and contests Rusabo's interpretation of paragraph 64 of the Compass Lease. An action for declaration of legal rights serves a legitimate purpose where, as here, all the entities which are interested in or which might be affected by the enforcement of paragraph 64 of the Compass lease are parties to the action (State v Wolowitz, 96 AD2d 47, 54 [2d 1983], citing Manhattan Storage & Warehouse Co. v Movers & Warehousemen's Assoc. of Greater New York, Inc., 289 NY 83, 88 [1942][remaining citations omitted]). In

In New York, the term "conditional limitation is defined as a restriction or qualification annexed to a conveyance of land or a lease providing that the estate granted is subject to a limitation which is future and contingent, on the happening of which the lease is thereupon to expire instantly by the express terms of the instrument creating it" (South Street Seaport Ltd. v Jade Sea Restaurant, Inc., 151 Misc2d 725, 727 [Civil Court, NY County 1991], citing Beach v Nixon, 9 NY 35 [1853]). Here, the lease is contingent not on an objective event but one which flows from the volition of the landlord's (South Street Seaport Ltd. v Jade Sea Restaurant, supra, citing Miller v Levi, 44 NY 489 [1871] [termination of lease upon the landlord's sale of the premises]). In this instance, the landlord is also required to give prior notice to the space tenant.

addition, a dispute between a commercial landlord and tenant concerning the interpretation of a lease provision is an appropriate subject for declaratory judgment actions under CPLR 3001 (Stuart v Kingsview Homes, Inc., 16 Misc2d 492, 497-498 [Sup Ct, Kings County 1959] appeal dismissed 13 AD2d 519 [2d Dept 1961]).

Accordingly, that branch of Compass' motion (motion sequence no. 001) to dismiss the action because it seeks an advisory opinion is denied.

Right To Assign

The remaining branches of Compass' motion to dismiss the complain for failure to state a cause of action are also denied. The Compass Lease does not limit Rusabo's right to assign its interest in the lease (cf., Compass Lease ¶ 9 [limitation on tenant's right to assign/sublease]). Paragraph 26 of the Compass Lease clearly permits the owner to assign and provides that

it shall be deemed and construed, without further agreement between the parties or between the parties and the purchaser of the property (or assignee of lessor) that such purchaser/assignee has assumed and agreed to carry out any and all covenants and obligation of lessor hereunder

Contrary to Compass' assertions, the Compass Lease does not limit Rusabo's right to transfer a portion of its interest to a third-party (Broadway Mack) in a ground lease. Moreover, if the owner, Rusabo, has the intention of developing the property, its election may not be defeated merely because it desires to make

those changes through *the* instrumentality of a subsequent lessee rather than directly by hiring its own building contractor (Hudson and Manhattan Railroad Co. v Mavers, 117 Misc 183, 185 [App Term, 1st Dept 1921]).

Accordingly, the remaining branches of Compass' motion (motion sequence no. 001) to dismiss the action for failure to state a cause of action are denied.

Conversion to Summary Judgment

Although summary judgment is available prior to joinder of issue with notice to the parties that the court is treating the application to dismiss as one for summary judgment under CPLR 3211(c) (Four Seasons Hotels Ltd. v Vinnik, 127 AD2d 310, 320 [1st Dept 1987]), the court should not convert the motion if the submitted proof indicates that the parties have not clearly charted a summary judgment course, and the pre-answer, pre-discovery status of the case involves issues which have not been fully appreciated and argued by the parties (see, Higgins v Whitney, 239 AD2d 174 [1st Dept 1997]).

Here, the issues are not limited to questions of law. Instead, a question of fact exists as to whether plaintiffs have actually taken sufficient steps (i.e., filed and received approval for plans to develop or reconfigure the overall premises) which would trigger the notice provision of subparagraph 64(a) of the Compass lease.

Broadway Mack's assignment, which was purchased for a \$10.00 assignment fee, is not dispositive of the claim of whether Rusabo and/or Broadway Mack is entitled to exercise its right to cancel the Compass Lease. The submitted copy of the proposed Ground Lease is still unsigned and presumably could be subject to change. The scope of the proposed changes is not an inconsequential detail since the owner of the leasehold is only entitled to terminate Compass's tenancy if the development would actually eliminate parking as a primary use of the land. That is why the parties bargained for a lease which requires filing and adoption of plans prior to termination of the tenancy. The parties intended that plaintiffs show that they shall modify the use of the lot before Compass is required to quit its leasehold.

Neither side states whether plaintiffs have actually filed or received approval for their plans to develop the premises. The lease does not state what entity is required to give approval and the parties do not address that issue in their papers.

Plaintiff maintains that Broadway Mack has performed various tests at the property, has drawn-up plans for the new building in accordance with the ground lease, and has spoken with the tenants which will be displaced by the construction. However, except for short excerpts from local newspapers and an alleged description from an entity known merely as "Studios Architecture," the record does not contain any proof that any tests have actually been

performed, that an architect has been hired, or that the venture is actually going forward.

Given the gaps in the record, conversion to summary judgment is inappropriate at this juncture (Morrison v City of Buffalo Bd. of Education, 199 AD2d 1074, 1075 [4th Dept 1993], rearg denied 1994 WL 131350 [4th Dept 1994]). Since discovery could indicate further areas of contention or raise additional issues of law, the court is unable to delineate the exact issues which would necessarily determine all the parties' rights and obligations, which is necessary in converting an application to dismiss to one for summary judgment (Four Seasons Hotels Ltd. v Vinnik, supra, 127 AD2d, at 320). The serious nature of the claims asserted by both sides -- the potential loss of a business by the tenant versus the right of the landlord to develop its property in order to increase its economic return -- warrants further documentary evidence.

Plaintiffs' cross motion (motion sequence no. 001) and motion (motion sequence no. 002) to convert its application to a motion for summary judgment is denied.

Accordingly, it is

ORDERED that Compass' motion (motion sequence no. 001) to dismiss the action is denied; and it is further

ORDERED that plaintiffs' cross motion (motion sequence no. 001) and motion (motion sequence no. 002) to convert its application

to a motion for summary judgment is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on Nov 8, 2002, at 11 a.m. at 71 Thomas Street, Room 205, New York, N.Y.

DATED: September 2, 2002

ENTER:



PAULA J. OMANSKY
J.S.C.