

Rusabo 610 LLC v Compass Parking Corp.
2003 NY Slip Op 30112(U)
January 23, 2003
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. QUINN
Justice

PART 47

0110570/2002

RUSABO 610 LLC.
VS
COMPASS PARKING CORP

SEQ 3

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 12/11/02

MOTION SEQ. NO. _____

MOTION CAL. NO. 105

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 IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 1/23/04

[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 nos. 003, 004, and 005 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. 003) to renew and reargue its prior application and to modify the court's prior decision and order dated September 20, 2002 (the "September 2002 Order"). In addition, defendant moves (motion sequence no. 003¹) for summary judgment dismissing the complaint, and an order striking the Notice of Cancellation of lease served by plaintiff as invalid.

Plaintiffs cross-move (motion sequence no. 003) for summary judgment on their first cause of action and for an order declaring that plaintiff Rusabo 610 LLC "Rusabo" and co-plaintiff Broadway Houston Mack Development LLC. ("Broadway Mack") are entitled to issue a cancellation-for-construction-notice under the Compass

¹Defendant refers to this second application in motion sequence no. 003 as a "cross-motion."

lease. In addition, plaintiffs cross-move (motion sequence no. 003) to dismiss the first, second, and third affirmative defenses and to stay discovery on the grounds that the Bill of Particulars seeks parol evidence.

Plaintiffs move (motion sequence no. 004) for summary judgment and an order declaring that the notice of cancellation dated November 25, 2002, which was issued by plaintiff is fully effective and cancels Compass's lease as of February 28, 2003, the cancellation date stated therein. In addition, plaintiffs move (motion sequence no. 004) for a permanent injunction directing defendant to vacate and surrender its premises on or before the cancellation date and to take all steps required to cease operation by the cancellation date. Plaintiffs also move (motion sequence no. 004) to amend and/or conform the complaint to the evidence and to include an allegation that the notice of cancellation has been served.

Defendant moves (motion sequence no. 005) for an injunction enjoining defendant from terminating the lease between plaintiff Rusabo and Compass until 30 days after a final determination by this court as to the right of plaintiffs to cancel defendant's lease.

Plaintiffs cross-move (motion sequence no. 005) to vacate the temporary restraining order nunc pro tunc (CPLR 6514).

FACTS

The facts have been more fully outlined in the September 2002 Order. Briefly, plaintiff Rusabo is the fee owner of real property known as 610-618 Broadway, New York. N.Y., and the structures thereon. Defendant, which operates a parking garage, entered into a lease with Rusabo on February 11, 1993 (the "Compass Lease"). This lease terminates on August 31, 2007. However, Rusabo reserved the right to cancel the lease at a latter date pursuant to the terms outlined in paragraph E4 of the Compass Lease.

On the prior application, Rusabo stated that it 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, plaintiffs did not submit a copy of the Ground Lease Option agreement and only presented a document entitled "Assignment and Assumption of Leases" which stated that the transfer was based on consideration of only \$10.00.

According to plaintiff, the Ground Lease Option was 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.

Based on this court's prior September 2002 Order, the parties have taken additional actions in respect to their claims as well as submitted further documents in support of their positions.

Rusabo claims that Broadway Mack is willing to close on the deal subject to Rusabo's ability to remove defendant from the leasehold. To support its claim, Rusabo now submits a copy of the Ground Lease between it and Broadway Mack.

Plaintiffs also try to address the issue of whether the parties have actually taken steps to develop the property as required by the Compass Lease. On this application Rusabo submits a copy of the work permit issued by the Department of Building ("DOB") which permits the removal of the existing structure. In addition, Rusabo submits a copy of the work permit application and a cover page of the architectural drawings as filed and stamped "approved." On June 12, 2002, Broadway Mack also filed an "Environmental Assessment Statement" with the New York City Department of City Planning requesting, inter alia, a zoning special permit "74-781, 74-922."

Subsequent to the court's September 2002 order, plaintiff served on defendant a cancellation notice dated November 25, 2002, Rusabo has notified defendant that the cancellation date shall be February 28, 2003. In addition, the cancellation notice also stated that

[t]he basis for this cancellation is that Landlord had determined to redevelop and/or reconfigure the Property,

and the result of said redevelopment and/r reconfiguration is the elimination of parking as a primary use (the "Redevelopment"). The Redevelopment will be carried out by Broadway Houston Mack Development LLC "Ground Lessee" or "BHMD"). Ground Lessee has now obligate itself to "close" on and to implement the Ground Lease, subject only to conditions relating to your surrender of possession in accordance with this Notice and the Lease.

However, defendant disputes whether Rusabo has taken sufficient steps to satisfy the surrender provisions of the Compass Lease. Defendant claims that plaintiffs have not filed or received all of the necessary permits. In particular, defendant claims that plaintiff has not filed sprinkler plans and that the building permits/plans, which were filed, were incomplete, incorrect, or misleading.

On December 4, 2002, defendant wrote to the DOB challenging the issuance of the work permit and its approval of the plans. In further support of its application before the court, defendant submits the affidavit of a Stewart O'Brien, a licensed engineer, who claims that the application and plans submitted for work at 610 Broadway are not in compliance with the Building Code. In particular, O'Brien opines that the application submitted was wrongly entitled an "Alteration Application" rather than a New Building Application. O'Brien further states that plaintiffs have failed to file a "Demolition Application" and that the submissions plans filed with the DOB failed to comply with the occupancy/construction classifications of the Building Code and the

use of cellars for public parking as required by the local zoning regulations.

The status of the defendant's application to DOB is not clear. Moreover, it is unclear if Broadway Mack has received the zoning permits from the New York City Department of City Planning.

Plaintiffs admit that they have not filed sprinkler plans but maintain that these documents are not filed with the initial plans and that sprinkler plans are the subject of a separate review process.

DISCUSSION

A motion for leave to reargue, pursuant to CPLR 2221, is addressed to the sound discretion of the court and may only be granted upon a showing that the court overlooked or misapprehended the facts or the law, or, for some other reason, mistakenly arrived at its earlier decision (William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept], lv dismissed in part, denied in part 80 NY2d 1005 [1992], rearg denied 81 NY2d 782 [1993]).

Interpretation of lease

The court grants leave to reargue the prior September 2002 decision to clarify its prior determination. Contrary to defendant's assertion, the September 2002 Order did not make a determination as to whether the rent charged to defendant was below market rent. Notwithstanding, the question of whether defendant's rent was set at a particular rate in order to compensate it for the

landlord's right to cancel the lease prior to the expiration date in 2007 is not relevant to the issue before this court, namely whether Rusabo's actions were sufficient to trigger the tenant surrender provisions in the Compass Lease.

This court properly found that the "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 (September 2002 Order at 7, [citations omitted])." This court shall not reconsider defendant's argument that this matter is premature since a motion to reargue is not designed to afford the unsuccessful party a second opportunity to argue issues previously decided, or to present arguments different from those originally asserted (William P. Pahl Equip. Corp. v Kassis, supra, 182 AD2d, at 27). Accordingly, that branch of plaintiffs' cross motion (motion sequence no. 003) to dismiss the first affirmative defense is granted.

As to the remaining arguments, there is no ambiguity in the Compass Lease as to whether Rusabo has a right to terminate the lease upon redevelopment of the property in accordance with the terms specified (cf., Van Wagner Advertisins Corp. v S&M Enterprises, 67 NY2d 186, 191 [1986]). The court correctly concluded that the Compass Lease contains a conditional limitation (September 2002 Order at 6, n. 1).

The court has also considered the contract provisions cited by

defendant and finds that defendant's interpretation of the Compass Lease as limiting Rusabo's right to transfer/assign is not supported by any provision of the Compass Lease. That paragraph 53(h) of the Compass Lease defines the term "lessor" to mean the "owner in fee simple of the Demises Premises" does not limit the right of Rusabo to transfer the property. In fact, paragraph 26 of the Compass Lease clearly permits Rusabo to sell or assign its rights:

[i]n the event of any sale of the said property (if lessor be the owner) and/or assignment by the lessor of its interest herein, lessor shall be and hereby is entirely freed and relieved of all covenants and obligations of lessor accruing thereafter, and 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.

Defendant's argument that Broadway Mack is not entitled to make alterations to the property is not persuasive because the Compass Lease warns defendant that Rusabo may transfer its obligations under the lease to another. Broadway Mack's eventual acceptance of the Ground Lease would permit that entity to act as the fee owner in respect to the fee owner's duty towards its commercial tenants. Nothing prohibits Rusabo from transferring its right to develop the property to Broadway Mack and Broadway Mack in turn, may alter and develop the property in accordance with the terms of the Ground Lease.

Moreover, the only limitation concerning assignment and subletting found in the Compass Lease are directed towards Compass as the lessee/tenant which must have the approval of the lessor/landowner prior to transfer of any rights (see, Compass Lease at §§ 9 and 67; September 2002 Order at 7-8 [citation omitted]).

Furthermore, the wording of section 31.01 of Broadway Mack's Ground Lease which limits the term landlord to mean the "owner in fee simple" does not limit or prevent Rusabo from requiring Broadway Mack to make the required changes or to develop the property. Accordingly, that branch of plaintiffs' cross motion (motion sequence no. 003) to dismiss the second affirmative defense is granted.

Defendant's motion to renew (motion sequence no. 003) is also denied since defendant has not presented new or additional facts, which, although in existence at the time of the original motion, were unknown to the party seeking renewal, and therefore not brought to the Court's attention (William P. Pahl Equip. Corp. v Kassis, supra, 182 AD2d, at 27; CPLR 2221[e][2]).

Injunctive Relief

Generally, parties seeking to stay a notice from a landlord seek a "Yellowstone injunction," a term which refers to a form of equitable relief which is designed to maintain "the status quo so that a commercial tenant, when confronted by a threat of

termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (225 East 36th Street Garage Corp. v 221 East 36th Owners Corp., 211 AD2d 420, 514 [1st Dept 1995]). In order to obtain the benefit of a Yellowstone injunction the tenant must show that (1) it holds a commercial lease; (2) it has received a notice of default, or a notice of cure or a threat of termination of the lease; (3) it requested the relief prior to the termination date, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (ibid.).

Plaintiffs argue that since the tenant has no right to cure, the court should not apply the more liberal requirements of a "Yellowstone injunction." Instead, plaintiffs argue that the court must apply the standard for injunctive relief required under CPLR 6301 which requires that the party seeking relief show there is a likelihood of success on the merits, that they will suffer irreparable injury unless the relief sought is granted, and that the balancing of the equities lies in their favor (Faberqe Intl., Inc. v DiPino, 109 AD2d 235, 240 [1st Dept 1985]).

Here, the elements of a Yellowstone injunction are not satisfied since the tenant has not defaulted on its obligation under the Compass Lease (225 East 36th Street Garage Corp. v 221

East 36th Owners Corp., supra, 211 AD2d, at 514; 233 East 86th Street Corp. v Park East Apartments, Inc., 131 Misc2d 242, 244 [Sup Ct, NY County 1986], affd 123 AD2d 536 [1st Dept 1986]). Instead, Rusabo is trying to enforce its conditional limitation by terminating the tenancy prior to expiration of the lease term for its own benefit.

Defendant must show that it is entitled to relief under CPLR 6301. It is difficult for the court to ascertain at this juncture which party will be successful on the merits. Unlike the ordinary situation where the conditional limitation is triggered by a single, discrete event (i.e., the tenant's voluntary filing for bankruptcy², total destruction of premises, or sale of the premises⁴), the Compass Lease contains very detailed provisions as to how and when Rusabo may terminate the leasehold. As held by this court "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" (September 2002 Order at 9). The court also found that the determination of whether Rusabo has decided to eliminate parking as a primary use

²Cf., Murray Realty Co. v Regal Store Co., 265 NY 332, 334 (1934); Sinclair Contracting Co. v Walzer, 179 Misc2d 228, 230 (Mun?Ct, NY County 1942).

³Cf., Crosstown Syndicate v Messinger, 112 NYS2d 139 (Mun Ct, NY County 1952).

⁴Cf., Miller v Levi, 44 NY 489 (1871).

depends upon the approval of administrative agencies (see, Compass Lease at ¶64 and September 2002 Order at 9).

Here, plaintiffs have presented proof that they have complied with the first requirement that Rusabo had decided to eliminate parking as the primary use of the lot. Rusabo has entered into a Ground Lease with Broadway Mack which included detailed plans for a building which contains an underground parking garage. However, a proposed redevelopment plan is not enough to trigger the tenancy termination provisions of paragraph 64 of the Compass lease. Plaintiffs must also show that the lessor both filed and received approval for "plans to redevelop or reconfigure the overall premises, the result of which is the elimination of parking as a primary use" (Compass lease, at ¶ 64[a]).

Although the Compass Lease does not state which administrative agency must approve the plans or describe the type of plans which must be filed, it is clear that paragraph 64(a) requires the lessor to file any and all plans necessary to permit building/redevelopment of the property. That means that the lessor has complied with paragraph 64(a) of the Compass Lease when it has finished filing every plan or document with the appropriate agency which is required to be filed prior to commencement of construction work on the lot. The agency must then approve or issue all licence permits. Plans or documents which may be filed subsequent to commencement of actual work are not included in the provisions of paragraph 64. If the lessor is unable to commence redevelopment pursuant to the Ground lease because an agency is withholding

approval then requirements of paragraph 64 are not satisfied.

Plaintiffs have filed plans with the DOB which were initially stamped "approved." Defendant has challenged the sufficiency of the filed plans with the DOB and has alleged that plaintiffs must also seek prior approval from various zoning or local land use boards. Even, if this court were to adopt plaintiffs' contention that term "approval" in the lease does not require the lessor to exhaust all administrative remedies, the submitted documents do not show whether plaintiffs have fully complied with all preliminary requirements. It is unclear whether Broadway Mack received its zoning permits from the New York City Department of City Planning. Also plaintiffs have not submitted any expert evidence whether they need prior approval from a local community board before they may commence work on or redevelop the lot in accordance with the Ground Lease.

However, this court declines defendant's request to review the accuracy of the documents submitted by plaintiffs to the various agencies involved. It is not the province of this court to review or analyze whether the submitted plans comply with the various municipal codes and regulations. That is a matter for the appropriate administrative agency. Since plaintiffs have not shown that they have all the required agency approvals, the court is unable to determine whether the plaintiffs were able to redevelop the lot or to commence construction work envisioned by the proposed Ground Lease prior to issuance of the cancellation notice.

If plaintiffs lacked full approval prior to issuing the Notice

of Cancellation on November 25, 2002, defendant will succeed on the merits. However, if plaintiffs can eventually show that they had all required approval prior to issuance of the cancellation notice, defendant may not rely on challenges made after November 25, 2002 to stop cancellation, extend its time to quit the premises, or revive its tenancy.

The balancing of equities also favors the defendant which stands to lose not only the remainder of its lease, but also its right to a 30-day period to negotiate a future garage lease on the developed property. Paragraph 64 (b) of the Compass Lease grants defendant the "right of first refusal" in leasing the planned parking garage "upon the same acceptable terms of a bona fide, third-party offer for such lease.-"

Given the importance of the issues before this court and given the fact that defendant will suffer irreparable harm if its lease and its future rental option are prematurely or improperly cancelled, the court shall temporarily enjoin plaintiffs and their agents from canceling the Compass Lease or taking further steps to evict defendant from its business in order to maintain the status

'Defendant has no right of first refusal "if a future garage facility on the Overall Premises is not leased separately from other primary uses of the Overall Premises" (Compass Lease ¶ 64[b] [iv]). In addition, defendant agreed in paragraph 64(b)(v) of the Compass Lease

that the use of the overall premises which permits the parking of cars as an auxiliary or ancillary use to other primary uses shall not be deemed a circumstance with is subject to the right of first refusal above described, unless such parking area is separately leased to a single operator thereof.

quo pending the determination of the underlying issues (Global Gen Corp. v 4947 Assocs., NYLJ 12/31/2002 at 18, col 5 [Sup Ct NY County 20021; see Calo v Chui, 2.54 AD2d 191, 192 [1st Dept 1998]; DeCastro v Bhokari, 201 AD2d 382, 383 [1st Cept 19941.

However, the injunction requested by defendant (motion sequence no. 005) shall not apply to attempts by plaintiffs and their agents to file building/redevelopment and/or other related plans/documents and/or amendments to said plans/documents and/or to prosecute or defend their submissions to the administrative agencies involved in the approval process.

That branch of plaintiffs' motion (motion sequence no. 004) for a permanent injunction directing defendant to vacate and surrender its premises and for related relief is denied. Plaintiff's cross-motion (motion sequence no. 005) to vacate the temporary restraining order is also denied.

Since plaintiffs have not supported their claim as to their damages during an injunction, the parties are directed to confer with the court on the amount of the undertaking (Chemical Bank v 635 Park Ave. Corp., 155 Misc2d 433 [Sup Ct, NY County 1992]; CPLR 6313). Defendant's failure to tender the required amount by the date set by the court shall result in the immediate vacatur of the preliminary injunction.

Summary Judgment and Amendment of Complaint

Since the court is unable to determine whether Rusabo was entitled to issue the November 2.5, 2002 cancellation notice, those branches of defendant's motion (motion sequence no. 003) for an

order of summary judgment dismissing the complaint and for an order declaring that the notice of cancellation of lease served by plaintiffs is invalid and to strike said notice, are denied. In turn, that branch of plaintiffs' motion (motion sequence no. 004) for summary judgment and an order declaring that the notice of cancellation dated November 25, 2002 is effective and properly cancels the Compass lease is also denied.

Plaintiffs' cross motion (motion sequenced no. 003) for summary judgment on its first cause of action for attorney fees and for an order declaring that Rusabo/ Broadway Mack are entitled to issue a cancellation-for construction-notice under the Compass lease, is denied. In addition, that branch of plaintiffs' cross motion (motion sequence no. 003) to dismiss the third affirmative defense are denied.

That branch of plaintiffs' motion (motion sequence no. 004) to amend and/or conform the complaint to the evidence and to include an allegation that the notice of cancellation has been served, is granted. Outstanding discovery request shall be determined at a conference.

Accordingly, it is

ORDERED that the branch of defendant's motion (motion sequence no 003) for leave to renew and reargue is granted and upon reargument/renewal the court adheres to its prior September 2002

Order; and it is further

ORDERED that the branches of defendant's motion (motion sequence no. 003) for an order of summary judgment dismissing the complaint and an order declaring that the notice of cancellation of lease, dated November 25, 2002 and served by plaintiffs, is invalid and to strike said notice, are denied; and it is further

ORDERED that the branches of plaintiffs' cross motion (motion sequence no. 003) to dismiss the first and second affirmative defense are granted and these claims are severed and dismissed. The Clerk is to enter judgment accordingly; and it is further

ORDERED that the remaining claims shall continue; and it is further

ORDERED that branch of plaintiffs' motion (motion sequence no. 004) to amend and/or conform the complaint to the evidence and to include an allegation that the notice of cancellation, dated November 25, 2002, has been served, is granted; and it is further

ORDERED that the branch of defendant's motion (motion sequence no. 005) for a temporary preliminary injunction is granted on the ground that the plaintiffs threaten or are about to do, or are doing or procuring or suffering to be done, an action in violation of the defendant's rights respecting the subject of the action and tending to render the judgment ineffectual, as set forth in the aforesaid decision; and it is further

ORDERED that plaintiffs, their agents, servants employees and all other persons acting under the jurisdiction, supervision and/or direction of plaintiffs, are enjoined and restrained, during the

pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant or otherwise, any of the following acts:

1. from terminating defendant's commercial lease, for the premises located at 610-618 Broadway, New York, N.Y. under a the "Notice of Cancellation" dated November 25, 2002, until 30 days after a final determination of this court as to the right of plaintiffs to cancel defendant's lease; and

2. from commencing and/or prosecuting any action or proceeding to recover possession or ownership of the subject leasehold for damages or other relief based upon the allegations in the notice until 30-days after a final determination to cancel defendant's lease; and it is further

ORDERED that the aforementioned injunction shall not apply to attempts by plaintiffs and their agents to file building/redevelopment and/or other related plans/documents and/or amendments to said plans/documents and/or to prosecute or defend their applications to administrative agencies; and it is further

ORDERED that the parties shall confer with the court to determine the amount of the undertaking; and it is further

ORDERED that the remaining branches of the parties applications and cross applications in this consolidated disposition have been denied for the reasons stated herein; and it is further

ORDERED that the parties are directed to appear for a

conference on March 7, 2003, at 11 a.m. at 71 Thomas Street,
Room 205, New York, N.Y. to discuss the undertaking and any
remaining discovery issue.

DATED: January 23, 2003

ENTER:



PAULA J. OMANSKY
J.S.C.