

1114 Truzechahn-Swig, LLC v W.R. Grace & Co.

2003 NY Slip Op 30147(U)

September 28, 2003

Supreme Court, New York County

Docket Number: 0110174/2003

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUP
Justice

PART 15

1114 Trade Show - Jwig UC

INDEX NO. 110174/03

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

W.R. Grace & Co. - v. - B.W.

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

OCT 01 2003

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

/CASE IS RESPECTFULLY REFERRED TO

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JI

WALTER B. TOLUP *W.B.T.*
J.S.C.
 NON-FINAL DISPOSITION

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

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1114 TRUZECHAHN-SWIG, LLC,

Plaintiff,

-against-

W.R. GRACE & CO.-CONN. and TAHARI, LTD.,

Defendants.

Index No. 110174/03
Mtn Seq. 001, 002,
& 003

-----X

WALTER B. TOLUB, J.:

Motion sequences 001, 002 and 003 are hereby consolidated and decided in the following memorandum opinion.

Defendant Tahari, Ltd. ("Tahari") moves to dismiss the complaint. Plaintiff moves to compel Tahari to pay the reasonable value for use and occupancy of the 48th Floor of 1114 Avenue of the Americas, New York, New York (the "premises"), cross-moves for leave to serve an amended complaint and for summary judgment on its first cause of action for possession. Nonparty RGT LLC ("RGT") moves for leave to intervene in the action as a party defendant upon the grounds that it occupies a portion of the subject premises.

Plaintiff leased premises to defendant W.R. Grace & Co. ("Grace") in or about May 1973. Tahari entered into a sublease with Grace in or about February 1996 with the consent of plaintiff. Although, both the lease and sublease expired on May 31, 2003, Tahari has not surrendered possession of the premises. Plaintiff commenced this action against Grace and Tahari for

possession, for payment of the reasonable value of use and occupancy from June 3, 2003, for attorneys fees and for damages.

Tahari's Motion to Dismiss

Tahari moves to dismiss upon two grounds. First, Tahari alleges that the complaint should be dismissed because plaintiff failed to specify the date of filing as required by CPLR § 305(a). Second, Tahari moves to dismiss the complaint based upon the "false" allegation of Tahari's state of incorporation.

"[F]ailure to comply with the technical requirements of CPLR § 305(a) does not warrant dismissal unless there is a showing of prejudice caused by the defect." Cruz v. New York City Housing Auth., 269 AD2d 108, 109 (1st Dept. 2000). Tahari argues that it was prejudiced by the absence of the filing date because its attorneys were deprived of the ability to determine when Tahari had to serve its answer. This argument is without merit as the time to answer is calculated from service of the complaint, not from filing. See CPLR § 3012(a). Thus no prejudice resulted from plaintiff's failure to include the date of filing on the summons.

Likewise, in order to be entitled to dismissal of the complaint for plaintiff's failure to properly plead its state of incorporation, Tahari must establish prejudice. See Weinstein v. Corwin, 239 AD2d 261, 261 (1st Dept. 1997). "'[D]efects shall be ignored if a substantial right of a party is not prejudiced.'"

Id. (quoting Foley v. D'Agostino, 21 AD2d 60, 65 (1st Dept. 1964)). Counsel for Tahari does not proffer any prejudice caused by plaintiff's inaccurate pleading of its state of incorporation.

Inasmuch as Tahari has failed to demonstrate any prejudice due to the technical defects in the summons and complaint, the motion to dismiss must be denied.

Plaintiff's Motions

-Amendment-

Plaintiff moves for use and occupancy pendente lite, for permission to amend the complaint nunc pro tunc, and for summary judgment on its cause of action for possession.

The motion to amend nunc pro tunc is granted solely to the extent of permitting plaintiff to correct its pleading to set forth Tahari's correct state of incorporation. Although this is not basis for dismissal, the amendment nunc pro tunc is appropriate.

-Summary Judgment-

"A motion for summary judgment may not be made before issue is joined (CPLR 3212[a]) and the requirement is strictly adhered to." Rochester v. Chiarella, 65 NY2d 92, 101 (1985). Summary judgment may not be granted prior to joinder even where there are no triable issues. See Mvun Chun v. North American Mortgage Co., 285 AD2d 42, 45 (1st Dept. 2000). The case cited by plaintiff addresses the situation brought under a summary proceeding

brought in the Civil Court, Housing Part. Further, the subtenant therein received notice of the petition and apparently defaulted. In the instant case Tahari has not defaulted and accordingly, the motion for summary judgment on plaintiff's first cause of action must be denied.

-Use and Occupancy-

As to plaintiff's motion for use and occupancy pendente lite, obviously, such a determination is not equivalent to summary judgment because by its definition, the concept contemplates the payment of use and occupancy pending the outcome of the underlying litigation. See Trump CPS, LLP v. Mever, 249 AD2d 22, 23 (1st Dept. 1998). The purpose of use and occupancy avoids the manifest unfairness in permitting a defendant to remain in possession of premises without paying for their use. MMB Assocs. v. Davan, 169 AD2d 422, 422 (1st Dept. 1991). Thus the plaintiff is entitled to payment of use and occupancy pendente lite.

The court determines that plaintiff has established that the fair market rental value of the premises is \$105,884.05 per month, That amount equals the lease payments that plaintiff would receive for the premises under an agreement executed by the law firm Kronish, Lieb, Weiner & Hellman. Plaintiff has demonstrated that Kronish, Lieb, Weiner & Hellman seek possession of the premises at that rental rate under a written agreement.

Accordingly, Tahari shall be directed to pay to plaintiff all use and occupancy due, at a rate of \$105,884.05, from June 2003 to the date of entry of this order within 10 days of entry of this order. Tahari shall pay use and occupancy at a rate of \$105,884.05 by the tenth day of each subsequent month.

Motion by RGT LLC to Intervene

RGT seeks leave to intervene because it occupies at least a portion of the premises, apparently through the permission of Tahari. RGT does not have a lease for the premises. Thus regardless of the risk to RGT, because it has no right vis-a-vis the plaintiff or Grace, its intervention is unnecessary to a determination in this action. "When . . . the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute, intervention should not be permitted." Quality Aggregates, Inc. v. Century Concrete Corp., 213 AD2d 919 (3rd Dept. 1995) (emphasis added).

Here, RGT offers no writing to indicate that it holds a sublease on the premises. Thus it cannot claim a right of possession of the premises through the plaintiff. Its entire claim to right to occupy the premises is based solely upon the fact that it currently occupies the premises through an apparently oral agreement with Tahari, Ltd. This constitutes, at

best, a cross-claim against Tahari, Ltd, not a defense to or counterclaim against plaintiff's right to possession. Further, because Tahari is actively litigating its right to possession of the premises, RGT has failed to show that it would suffer any substantial prejudice if not granted leave to intervene. Because RGT does not claim any right to possession of the premises independent of Tahari and because its right to possession is not contained in writing, any dispute between it and Tahari should be decided in a separate litigation between those parties. The motion for leave to intervene is denied. Accordingly it is

ORDERED that the motion of Tahari, Ltd. to dismiss the complaint is denied; and it is further

ORDERED that the cross-motion of plaintiff to serve an amended complaint nunc pro tunc is granted and plaintiff shall serve the amended complaint within 7 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the cross-motion of plaintiff for summary judgment is denied with leave to renew; and it is further

ORDERED that plaintiff's motion for use and occupancy is granted; and it is further

ORDERED that defendant Tahari, Ltd. shall pay past use and occupancy at the rate of \$105,884.05 per month for months June 2003 through September 2003 within 10 days of service of a copy of the this order with notice of entry; and it is further;

ORDERED that, commencing in October 2003, Tahari, Ltd. shall pay use and occupancy at the rate of \$105,884.05 per month by the tenth day of each month; and it is further

ORDERED that in the event that Tahari, Ltd. fails to comply with the court's determination of use and occupancy, the answer of Tahari, Ltd. shall be deemed stricken and a warrant of eviction will issue; and it is further

ORDERED that the motion by RGT LLC to intervene is denied.

Counsel for the parties are directed to appear for a preliminary conference at I.A. Part 15, Room 335, 60 Centre St., New York, NY on December 12, 2003 at 11:00 a.m.

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

Dated: 9/28/03



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