

Rusabo 610 LLC v Compass Parking Corp.
2003 NY Slip Op 30191(U)
March 4, 2003
Supreme Court, New York County
Docket Number: 110570/02
Judge: Paula J. Omansky
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKI
Justice

PART 47

Prudential 610 LLC

INDEX NO. 11 0576/02

MOTION DATE 2/28/03

MOTION SEQ. NO. 006

MOTION CAL. NO. 13

Compass Partners 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 t^ms motion

SCANNED

MAR 07 2003

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

D^{td} 3/4/03

PAULA J. OMANSKI 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.:

In this action for declaratory relief, concerning the exercise of a cancellation clause in a commercial property lease, plaintiffs Rusabo 610 LLC ("Rusabo") and Broadway Houston Mack Development LLC ("Broadway Mack") move for summary judgment and for an order directing defendant Compass Parking Corp. ("Compass") to vacate on or before February 28, 2003 on the basis that the accompanying notice dated November 25, 2002 satisfies this court's requirement as stated in this court's decision and order dated January 23, 2003 (the January 2003 order") that plaintiffs show that the filing made and approvals obtained as of November 25, 2002 constituted all of the filing and approvals required in order to commence construction of the new building.

In the event that defendants do not vacate the lot by February 28, 2003, plaintiffs also seek an undertaking in the amount of \$19,000 per day corresponding to the alleged losses incurred from the delay or request that Compass post a lump sum of \$3.5 million.

Defendant Compass cross-moves for leave to renew and reargue

this court's January 2003 order.

FACTS

The facts have been more fully outlined in the September 2002 order and the January 2003 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 later date pursuant to the terms outlined in paragraph 64 of the Compass Lease.

This court held in the January 2003 order that 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 Advertising Corp. v S&M Enterprises, 67 NY2d 186, 191 [1986]). This court also held that nothing in the Compass lease 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.

This court also held that

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.

(January 2003 decision at 12).

In the January 2003 order this court also held that plaintiffs have not shown that they have all the required agency approvals. As a result, the court was 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.

However, this court clearly held:

[i]f 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.

(January 2003 order, at 14).

DISCUSSION

Contrary to defendant Compass' assertion, plaintiff Rusabo is not engaged in a sham business agreement with Broadway Mack. This court also rejects defendant Compass's assertion that the proposed new construction will not eliminate parking as the primary use of the property. The new building includes seven floors of office/commercial space and a two-floor underground garage. The contemplated structure is not seven-floor multilevel parking garage. Plaintiffs have also presented evidence that parking comprises 49% of Rusabo's gross revenues whereas after the construction of the new building the projected income from the below-ground parking garage will only be 6% of the total revenues.

Accordingly, plaintiffs have shown that the primary use of the premises after construction of the building will be commercial office space and not parking.

Plaintiffs have properly served a notice to cure and terminate by showing that they complied with paragraph 64(a) of the Compass lease. In support of their claim, plaintiffs present affidavits of expert witnesses which indicate that as of November 25, 2002 plaintiffs had filed and obtained all the governmental approval necessary to commence construction. In particular, plaintiffs present the affidavit of Robert Anderson, a Building Code

consultant, who states that the Department of Buildings ("DOB") had approved the plaintiffs' proposed use of the lot, as of right. Anderson also states that the DOB approved the plumbing and mechanical drawings as well as issued a work permit on October 30, 2002, for removal of the one-story structure presently on the lot and the construction of a new seven story building with an underground garage'.

Plaintiffs also submit the affidavit of a land-use attorney Michael T. Sillerman, who opines that since the construction in the DOB's approved plans is "of right," plaintiffs are not required to seek a variance or a special permit or any other discretionary land use approval from another governmental agency.

The only remaining zoning issue is whether rental *of* the ground floor space must be rented to furniture store or whether the space may be used by a supermarket. However, plaintiffs have shown that any change in the type of tenant which may occupy the ground floor shall not impact on the work permit or any of the other approvals already obtained.

Moreover, Compass has not supported its claim that plaintiffs have failed to file and obtain approvals required to commence

After completion of the construction, the owner(s) will be required to obtain a certificate of occupancy, as well as file and receive approval for fire-safety sprinklers and electrical work. These approvals are obviously not required prior to construction and do not fall within the purview of paragraph 64(a) of the Compass lease.

construction and that the DOB is still considering defendant's objections to plaintiffs' work permits.

Plaintiff's motion for summary judgment is granted and defendant Compass is directed to vacate the premises within 30 days of service of notice of entry this order.

This court shall not reach that branch of plaintiffs' motion which seeks the posting of an undertaking and delay damages. Defendants shall pay all back rent, if any, and outstanding use and occupancy, up to and including the month of March 2003, within 20 days of service of notice of entry. Monthly use and occupancy shall be set at the rate for monthly rent and "additional rent," as if the lease were in full force and effect. In the event that Compass fails to pay rent/additional rent and/or quit the demised premises by the required date, plaintiffs may renew its motion for a hearing to determine an undertaking and for additional delay damages.

This court shall not reconsider defendant's arguments made in the prior application 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, 182 AD2d 22, 27 [1st Dept], lv dismissed in part, denied in part 80 NY2d 1005 [1992], rearg denied 81 NY2d 782 [1993]).

Compass's cross motion to renew is also denied since this

defendant has also failed to draw the court's attention to new or additional facts, which would require modification of this court's January 2003 order (William P. Pahl Equip. Coro. v Kassis, suora, 182 AD2d, at 27; CPLR 2221[e][2]). Compass' cross-motion for leave to reargue/renew is denied.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on its complaint is granted and defendant Compass is directed to vacate the demised premises within 30 days of service of notice of entry this order; and it is further

ORDERED that defendant Compass is directed to pay all back rent, if any, and outstanding use and occupancy, up to and including the month of March 2003, within 20 days of service of notice of entry; and it is further

ORDERED that plaintiffs' may renew that branch of their motion for an undertaking and for additional delay damages in the event that Compass fails to pay rent/additional rent and/or quit the demised premises by the required date; and it is further

ORDERED that Compass' cross motion for leave to reargue/renew the holdings in the January 2003 order is denied.

DATED: March 4, 2003

ENTER:



PAULA J. OMANSKY
J.S.C.