

Hannibal Associates, L.P. v Safeway Inc.

2004 NY Slip Op 30001(U)

April 1, 2004

Supreme Court, New York County

Docket Number: 0601674

Judge: Walter B. Tolub

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SCANNED ON 4/7/2004
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB

PART 15

Justice

0601674/2003

HANNIBAL ASSOCIATES, L.P.

vs
SAFEWAY INC.

SEQ 1

DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
APR 08 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/1/04

WALTER B. TOLUB .S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

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

-----X
HANNIBAL ASSOCIATES, L.P.

Plaintiff,

Index No. 601674/2003
Mtn Seq. 001

- against -

SAFEWAY, INC.,

Defendant.
-----X

WALTER B. TOLUB, J.:

Defendant Safeway, Inc. moves to dismiss the complaint based upon i) documentary evidence; ii) the failure of plaintiff, a foreign limited partnership, to seek authorization to do business in New York; iii) the absence of a necessary party; and iv) the failure to state a cause of action.

Defendant, as successor in interest, leased property located at 1200 F.M. Road 51 South, Decatur, Texas (the "premises") from nonparty Hannibal Properties Corp. ("Properties"). Properties assigned an estate interest in years in the premises to plaintiff for a term expiring on January 16, 2011 that was subject to the lease. Properties assigned a remainder interest in the premises to nonparty RM 15 Safe Corp. ("RM 15 Safe"). Properties apparently assigned its interest in the lease to nonparty Malease 15 Safe Corp. ("Malease"),

Under Article XVI of the lease, Defendant had the right to terminate the lease on notice in the event that the premises became "uneconomic" or unsuitable. This right to terminate was

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conditioned upon Defendant offering to purchase the premises contemporaneously with its termination notice. Defendant exercised this right and offered to purchase the premises. The offer was accepted by Malease, the successor lessor, plaintiff, the holder of an estate of years for the premises, and RM 15 Safe, the holder of the remainder interest in the premises. On or about January 27, 2003, the premises was conveyed to Defendant by deeds from plaintiff and RM 15 Safe.

Article XIX of the lease provides that in the event of sale to the lessee, the lessor shall convey title free and clear of any liens and encumbrances, other than those that the lessee agreed to pay or discharge. It also required the lessee to pay "all" expenses of conveyance of title, "including, without limitation", attorneys' fees and "other charges" incurred by the lessor in connection with the conveyance. Article II of the lease defines "lessor" as nonparty Properties, its successors and assigns or the "then fee owner" of the premises. Plaintiff commenced this action to recoup the cost incurred in the sale of the premises, including a delay in closing allegedly caused by Defendant, assessed charges for prepayment of a mortgage loan on the premises, and attorneys' fees.

Defendant argues that the complaint should be dismissed because plaintiff is a foreign limited partnership doing business in New York without authorization. Plaintiff's counsel states

that while it was not authorized to do business in New York at commencement of the action, it currently is authorized.

Plaintiff failed to submit proof of this authorization other than an attorney's affirmation. Accordingly, plaintiff shall be directed to serve on the defendant proof that it is authorized to do business in New York. That portion of defendant's motion is denied with leave to renew in the event that plaintiff fails to serve proof that it is currently authorized.

Defendant argues that plaintiff is not an assignee of the lease and therefore may not maintain the action. Defendant also argues that the mortgage prepayment penalty was the lessor's obligation and is not an expense to be paid by it under the lease.

Both parties agree that the lease is governed by Texas law. Under Texas law, whether a contract is ambiguous is a question of law to be determined, initially, by an examination of the document. Columbia Gas Transmission Cora. v. New Ulm Gas, Ltd., 940 SW2d 587, 589 (TX 1996). "[I]f the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, which creates a fact issue on the parties' intent." Id. Under both Texas and New York law, to be entitled to summary relief based upon an affirmative defense, a defendant must prove conclusively all elements of the defense as a matter of law. See Roark v.

Stallworth Oil and Gas, Inc., 813 SW2d 492, 495 (TX 1991); Arnav Indus. Inc. v. Brown, Ravsman, Millstein, Felder & Steiner, LLP, 96 NY2d 300, 303 (2001).

Defendant **does** not dispute the allegation in the complaint that Properties, the original owner and lessor, conveyed the property to plaintiff or that plaintiff conveyed a deed to the defendant. Thus it is undisputed that while plaintiff was not an assignee of the lease, it possessed an ownership interest for an estate in years in the premises and conveyed that interest to defendant. The lease required defendant to bear the costs of the conveyance incurred by, inter alia, "successors and assigns [of Properties], or the then fee owner. . . ." [emphasis added].

Defendant, as the moving party, bears the burden of establishing that plaintiff was not a "then fee owner". It is undisputed that plaintiff had an ownership interest, for an estate in years, in the premises. Defendant submitted no case law that would establish as a matter of law that plaintiff's estate interest did not constitute a "fee ownership" under Texas law. Because defendant failed to establish as a matter of law that plaintiff was not a "fee owner" under Texas law, it has failed to establish its right to judgment as a matter of law.

Likewise, the issue of which party must bear the mortgage prepayment penalty cannot be decided as a matter of law. Contrary to defendant's argument, plaintiff's claim is not based

upon a "nonsensical, illogical and almost bizarre interpretation" of Article XIX of the lease. The obvious interpretation of that article requires the lessee to pay the lessor's expenses and other charges incurred in the conveyance of the premises. The language that required plaintiff to deliver and execute a deed to defendant free and clear of any indenture describes the status of title to be conveyed at closing. The language does not address the allocation of costs incurred in the conveyance. The issue of the allocation of costs in the conveyance is addressed in the next sentence of Article XIX, which requires defendant to bear the expenses of the conveyance. The lease, however, does not expressly define the prepayment penalty as an expense of conveyance to be borne by defendant. By reading the sentence in context, it cannot be determined as a matter of law whether the mortgage prepayment penalty is included as an expense of the conveyance.

The contract is ambiguous on the two issues discussed above. Because defendant has not established that its interpretation of the documents control as a matter of law, the motion must be for summary judgment based upon documentary evidence must be denied.

Although defendant, in its notice of motion to dismiss, sought dismissal based upon the absence of a necessary party and for failure to state a cause of action, defendant does not argue these points in its submissions. The arguments are therefore

waived and the motion denied. Accordingly, it is

ORDERED that plaintiff shall serve upon defendant proof that it is authorized to do business in the State of New York within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendant is granted leave to renew its motion to dismiss based upon plaintiff's failure to obtain authorization to do business in New York in the event that plaintiff fails to comply with the preceding paragraph; and it is further

ORDERED that the balance of the motion to dismiss is denied.

Counsel for the parties shall appear for a preliminary conference at I.A. Part 15, Room 335, 60 Centre St., New York, NY on May 14, 2004 at 11:00 a.m.

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

Dated: 4/1/04

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

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