

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

2004 NY Slip Op 30205(U)

March 12, 2004

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 Y

0110174/2003

1114 TRIZECHAIN-SWIG
VS
W.K. GKACE & CO. CONN

SEQ 04

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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.**

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 3/12/04

WALTER B. TOLUP
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

-----X
1114 TRIZECHAHN-SWIG, LLC,

Plaintiff,

**Index No. 110174/2003
Mtn Seq.**

-against-

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

-----X

WALTER B. TOLUB, J.:

Motion Sequences 004, 005, and 006 are hereby consolidated and disposed according to the following decision and order.

Plaintiff 1114 Trizechahn-Swig, LLC ("Trizechahn") moves for summary judgment on its first cause of action for the issuance of a warrant of eviction, the award of possession, and the ejection of the defendants from the 48th Floor of 1114 Avenue of the Americas, New York, NY (the "premises") and for summary judgment dismissing the 41 affirmative defenses and counterclaims of the defendants. Defendant W.R. Grace & Co. ("Grace") moves for an order dismissing the 41 affirmative defenses and cross-claims of defendant Tahari, Ltd ("Tahari") Tahari moved to serve an amended answer.

On January 9, 2004, this court granted Tahari's motion for leave to serve an amended answer. The court has accepted affirmations and affidavits filed subsequently to service of the amended answer. This decision addresses the arguments raised as they relate to Tahari's amended answer

Trizechahn has sued defendants for possession of the premises and for damages resulting from Tahari's holdover after the expiration of Tahari's sublease with Grace. Grace joins in the relief requested by plaintiff. Tahari counterclaims to compel plaintiff to lease the premises to it.

Documentary evidence establishes the following. Grace leased the premises for a fixed thirty year term from a predecessor landlord by lease dated July 7, 1972. On February 12, 1993, a predecessor landlord granted an option to lease the premises to nonparty Kronish, Lieb Weiner & Helman ("Kronish"), for a term commencing on the later of either June 1, 2003 or the satisfaction of certain conditions by the landlord. The terms of the option required Kronish to exercise it by December 7, 2001. Tahari subleased the premises from Grace by lease dated February 23, 1996, three years after Kronish obtained the option to lease the premises at the end of Grace's term. The sublease expired by its terms on May 31, 2003. Neither the lease nor the sublease provided for the right for an extension of the term. By letter dated November 15, 2001, Kronish exercised its option to lease the premises.

Trizechahn has submitted two deeds that transferred title from separate predecessor owners to Trizechahn under its former name. Tahari submitted two additional deeds that indicate that title to the premises was transferred from four separate sources

to two separate companies, one known as "1114 Avenue of the Americas Associates LLC", the plaintiff's former name, and one known as "1114 Avenue of the Americas LLC".

Tahari argues in opposition to the motion that because deeds from different people indicate that a different company also received title to the property, Trizechahn is not "seized in fee", cannot establish title and, therefore, lacks standing to maintain the action. Tahari also argues that questions of fact arising from its counterclaims, defenses and cross-claims require that the motion be denied.

Tahari alleges that it received oral assurances from Grace, and, upon information and belief, with Trizechahn's knowledge, that it would be allowed to extend its lease. Tahari alleges that it made substantial and more permanent modifications to the space based upon the representations. It alleges that it did not discover the Kronish option until years after it had leased and renovated the premises. Tahari also alleges that, in settlement of a separate summary proceeding, Grace further represented that Tahari would be able to extend the lease. Tahari claims that Trizechahn, through a representative, assured it that it would be able to occupy a separate floor in the building and could remain in the premises until that floor was ready. In reliance of these representations, Tahari did not pursue other leasing opportunities. Tahari alleges that plaintiff also discriminated

against *it*, based on the national origin of its president, in refusing to **lease** to it the subject premises or other commercial property Trizechahn owns.

The various deeds filed with the New York County Register establish that Trizechahn is an owner of the premises. Tahari cites no case law that supports its proposition that Trizechahn may not maintain an action for possession where it is only one of several owners of the premises. Tahari failed to submit any evidence to suggest that the grantors of title to Trizechahn did not have title to the property, nor any evidence that the Trizechahn did not receive title such that it is an owner of the property *to* the extent of the rights previously held by its direct grantors.

"Where two or more persons are entitled to the possession of real property as joint tenants or tenants in common, one or more of them may maintain the action to recover his or their undivided shares in the property in any case where such an action might be maintained by all." RPAP § 621; see Commonwealth Water Co. v. Brunner, 175 AD 153, 160 (2nd Dept. 1916) (holding one tenant in common may maintain action for ejectment against a person who is not a tenant *in common*). Because Trizechahn submitted two deeds that granted it title to the premises, even though it may not have established that it owns a 100 percent interest, it has sufficiently establish its title to the premises and has standing

to maintain this action for possessinn.

As to the right of possession, Kronish obtained its option to lease the premises prior to Tahari obtaining any rights to the premises. Kronish has exercised its option to lease the premises. Grace's lease and Tahari's sublease have expired. Neither the lease nor the sublease contained a provision that would allow for the extension of the term. It is undisputed that Tahari has no written agreement that grants it the right to remain in possession of the premises. Rather, Tahari seeks to maintain possession through the application of equity based upon the actions and verbal statements allegedly made by representatives of Grace and Trizechahn.

However, Tahari has failed to raise any issue of fact as between it and Kronish that would justify imposing equitable relief to the detriment of Kronish. Tahari's arguments regarding representations made to it, fraud perpetrated against it and discrimination against it by Trizechahn and Grace do not create possessory rights that are superior to Kronish's written option to lease the premises. Assuming arguendo that Tahari has raised an issue of fact as to its right to equitable relief against Trizechahn and Grace, Kronish's right to possession of the premises is superior to Tahari's because in the presence of conflicting equities, one that is prior in time is superior in right. See Suchy v. Frankenberg, 251 AD 349, 352 (1st Dept..

1937). The recovery of possession from Tahari by Trizechahn is a predicate to **delivery** to Kronish. Because documentary evidence establishes that Kronish obtained the option to lease the premises prior to Tahari's obtaining the sublease and has exercised the option, and because Tahari's claim for possession is one for **equitable** relief, it would be inequitable to obstruct Kronish's possession. Further, any injury to Tahari could be sufficiently compensated by monetary damages. Accordingly, the motion by plaintiff for possession of the premises must be granted.

Tahari has sufficiently plead estoppel, reasonable reliance and discrimination to permit this matter to proceed through discovery. The allegations that Tahari expended substantial money based upon oral representations made by the representatives of Trizechahn and Grace, and the resulting damages, suffice to defeat a pre-discovery motion for summary judgment for Tahari's claims that **seek** damages. Likewise, the allegations of discrimination based upon national origin suffice to proceed with the claim past through discovery. Therefore, the remainder of the pleadings are severed and shall continue. Accordingly, it is

ORDERED that the motion by 1114 Trizechahn-Swig, L.L.C. for summary judgment on its first cause of action is granted; and it is further

ORDERED that the motions by 1114 Trizechahn-Swig, L.L.C. and

W.R. Gracc & Co. for summary judgment dismissing the affirmative defenses, counterclaims and cross-claims of Tahari, Ltd are granted to the extent that the requests for specific performance that would compel the plaintiff to lease the premises to it are dismissed; and it is further

ORDERED that possession of the 48th Floor of 1114 Avenue of the Americas, New York, NY is awarded to 1114 Trizechahn-Swig, LLC; and it is further

ORDERED that defendant Tahari, Ltd. surrender possession of the 48th Floor of 1114 Avenue of the Americas, New York, NY immediately; and it is further:

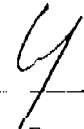
ORDERED that the remaining causes of action, defenses, counterclaims and cross-claims are hereby severed and shall continue; and it is further

ORDERED that the balance of the motions for summary judgment are denied with leave to renew upon the completion of discovery.

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 April 2, 2004 at 11:00 a.m.

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

Dated: 3/14/04



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