

Peach Parking v 346 West 40th Street, LLC
2004 NY Slip Op 30225(U)
December 13, 2004
Supreme Court, New York County
Docket Number: 0103096/2004
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE D. TOLUB
Justice

PART 15

0103096/2004

PEACH PARKING CORP.
vs
346 WEST 40TH STREET LLC.

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 _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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

DEC 15 2004

NEW YORK
COUNTY CLERKS OFFICE

Dated: 12/13/04

Justice D. Tolub
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
PEACH PARKING,

Plaintiff,

-against-

346 WEST 40TH STREET, LLC,
KINNEY SYSTEM, INC., and
THE HERTZ CORPORATION,

Defendants.
-----x

Index No.103096/2004
Mtn Seq.

WALTER B. TOLUB, J.:

Motion sequences 001, 002, 003 and 004 are hereby consolidated and disposed in accordance with the following memorandum opinion and order.

Defendant Kinney System, Inc. ("Kinney") moves to dismiss the plaintiff's amended complaint and all cross-claims of co-defendant 346 West 40th Street, LLC ("346 W. 40th St.") and for a Yellowstone injunction tolling the expiration of the notice to cure served by 346 W. 40th St. Plaintiff Peach Parking Corp. ("Peach") likewise moves for a Yellowstone injunction against the notice to cure served by 346 W. 46th St. Peach also moves to dismiss the counterclaims of defendant Hertz Corporation ("Hertz"). Hertz cross-moves to withhold rent or to pay rent into escrow and for leave to replead its counterclaims if necessary.

This action arises from a dispute between the several parties over the responsibility to repair a parking lot operated

by Hertz. According to counsel, 346 W. 40th, as successor-in-interest to a lease, leases the premises to Kinney under a prime lease. Kinney subleases the premises to Peach as successor-in-interest to a non-party sublessee. Peach subleases the premises to Hertz. Hertz operates a parking lot at the premises. The court notes that, due to missing and redacted documents, the parties have not established conclusively the respective interests in the premises.

The prime lease between 346 W. 40th St. and Kinney required Kinney to make all structural and non-structural repairs to the premises. An addenda to the prime lease limits Kinney's obligation to make structural repairs to \$50,000 over the term of the lease. A document submitted by the parties, redacted to excise the names of parties and missing the signature page, purportedly constitutes the sublease between Kinney and Peach, which Peach purportedly obtained as successor-in-interest. The sublease between Peach and Hertz requires Hertz to maintain the premises in good condition and to make all necessary non-structural repair "both inside and outside, ordinary and extraordinary."

Peach commenced this action for a declaration of its rights and obligations under the lease and subleases with regard to the responsibility to repair the premises. Peach seeks a declaration, inter alia, that it is not obligated to make the

repairs and that, if it makes the repairs, it is entitled to reimbursement from the defendants. Hertz argues that the premises needs structural repair and that the obligation to repair lies with the prime lessor or sublessors. Hertz has interposed counterclaims against Peach, is its direct sublessor, for abatement of rent and for constructive eviction. Defendants 346 W. 40th St. and Kinney separately claim that the repairs are not their responsibility, respectively, because either the need repairs are non-structural or, if structural, were necessitated due to the negligent maintenance of the premises.

Since the commencement of this action, certain conditions on the premises apparently have been repaired and the costs of those repairs have, at least in part, been allocated among the parties. A dispute as to the obligation, in the future, to repair certain areas of the premises, including the building's facade, drains, roof and sidewalk vault, remains. Also, 346 W. 40th St. has served a notice to cure on Kinney, Peach and Hertz for the breach of the obligation to perform non-structural repairs and for damages to the structure of the building for failing to maintain the premises.

Motion to Dismiss by Defendant Kinney

Defendant Kinney moves to dismiss the complaint based upon documentary evidence and the failure to state a cause of action. Kinney argues that plaintiff may not obtain declaratory relief

because no notice of default has been served by any party and because the lease and sublease establish that Kinney is not required to make the repairs. The motion is denied.

The refusal of a party to acknowledge a responsibility acquired by lease constitutes a justiciable controversy. See Wavertree Corp. v. 135 Waverly Assocs., 258 AD2d 392 (1st Dept. 1999) (holding defendant's history of refusing to remit taxes due under a lease constitutes justiciable controversy). It is undisputed that the property is currently in need of repairs. The parties clearly dispute their obligations and rights under the various leases as to the responsibility to conduct presently necessary repairs. Clearly, a declaration as to the responsibility to make currently necessary repairs to the building constitutes a justiciable controversy for which plaintiff can obtain relief.

As to that portion of the motion based on documentary evidence, while the leases state that the obligations to make the repairs, the leases do not establish that the repairs at issue are either structural or non-structural. Finally, the redacted, incomplete lease purportedly between Peach and Kinney cannot constitute documentary evidence upon which relief may be obtained at the pre-discovery stage.

Peach and Kinney's Motions for Yellowstone Injunction

Peach and Hertz's motion for a Yellowstone injunction are

granted. The only opposition submitted by 346 W. 40th St. addresses the merits of the ultimate issue. Essentially, 346 W. 40th St. argues that because it will succeed on its claims that deterioration was caused by the failure to maintain the premises, the Yellowstone injunction should not issue. This opposition fails to address the circumstances under which a Yellowstone injunction will issue. To obtain a Yellowstone injunction, a tenant needs to demonstrate that it holds a commercial lease, it received a notice to cure from the landlord, it requested injunctive relief prior to the termination of the lease and it is prepared to cure the alleged default by any means short of vacating the premises. Graubard Mollen Horowitz Pomeranz & Shapiro v. 699 Third Ave. Assocs., 93 NY2d 508, 514 (1999). A tenant need not show success on the merits in order to obtain a Yellowstone injunction. TSI West 14, Inc. v. Samson Assocs., LLC, 8 AD3d 51, 53 (1st Dept. 2004). The tenants have met their burden and a Yellowstone injunction will issue.

Peach's Motion to Dismiss the Counterclaims of Hertz

Peach moves to dismiss the counterclaims of Hertz for failure to state a cause of action. Hertz's counterclaims seek a declaration that Peach has breached the lease and that Hertz is therefore entitled to an abatement of rent and for a declaration that Hertz has been constructively evicted. As to the first counterclaim, whether Hertz will be entitled to an abatement of

rent is a question of fact that will turn on the ultimate responsibilities of the parties and is sufficiently pleaded to survive the instant motion to dismiss. Therefore the motion to dismiss Hertz's counterclaim for rent abatement is denied.

Constructive eviction occurs where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of premises. Barash v. Pennsylvania Terminal Real Estate Corporation, 26 NY2d 77, 81 (1970). In order to maintain an action for constructive eviction, a tenant must abandon or surrender possession of a portion of the premises. Lincoln Plaza Tenants Corp. v. MDS Prop. Dev. Corp., 169 AD2d 509, 512 (1st Dept. 1991). Although plaintiff alleges that it has been unable to use a portion of the premises, such a general allegation does not sufficiently allege that the tenant was deprived of the beneficial enjoyment or actual possession of a portion of the premises. Accordingly, Hertz's second counterclaim must be dismissed for failure to state a cause of action.

Hertz's Cross-motion

Hertz's cross-motion to withhold rent or to pay rent into escrow is denied. "A tenant's duty to pay rent is not suspended, even if the landlord breaches its obligations under the lease, unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold his rent."

Westchester County Indus. Dev. Agency v. Morris Indus. Builders, 278 AD2d 232, 232 (2nd Dept. 2000). Hertz has failed to establish that the lease contains a provision that would permit it to withhold rent and that portion of the motion is denied. Hertz's cross-motion for leave to replead its counterclaim is denied, without prejudice, due to its failure to submit a proposed pleading supported by evidence of its merit. See HT Capital Advisors, LLC v. Optical Resources Group, Inc., 276 AD2d 420, 420 (1st Dept. 2000). Accordingly, it is

ORDERED that the motions of Peach Parking Corp. and Kinney System, Inc. for a Yellowstone injunction are granted; and it is further

ORDERED that the time in which the lessee and sublessees must cure the alleged defaults in the notice to cure served by 346 40th Street, LLC, dated April 16, 2004, is hereby tolled until further order of this court; and it is further

ORDERED that 346 40th Street, LLC is enjoined from terminating the subject leases and subleases or in anyway enforcing the terms of its notice to cure, dated April 16, 2004, until further order of this court; and it is further

ORDERED that the motion of defendant Kinney System, Inc. to dismiss the complaint is denied; and it is further

ORDERED that the motion of plaintiff to dismiss the first counterclaim of defendant The Hertz Corporation is denied; and it

is further

ORDERED that the motion of plaintiff to dismiss the second counterclaim of defendant The Hertz Corporation is granted and the second counterclaim dismissed without prejudice; and it is further

ORDERED that the cross-motion of defendant The Hertz Corporation is denied.

Counsel for the parties are directed to appear for a compliance conference at I.A. Part 15, Room 335, on January 7, 2005 at 11:00 a.m.

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

Dated: 12/13/04

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

FILED
DEC 15 2004
COUNTY CLERK'S OFFICE