

101 Park Avenue Associates v Lipper & Co. L.P.

2004 NY Slip Op 30293(U)

October 8, 2004

Supreme Court, New York County

Docket Number: 107092/04

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

0107092/2004

101 PARK AVENUE ASSOCIATES

VS
LIPPER & CO., L.P.

INDEX NO. 107092/04

MOTION DATE _____

SEQ 1

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to 16 were read on this motion to/for SUMMARY JUDGMENT

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

Notice of Motlon/ 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiff 101 Park Avenue Associates' motion for summary judgment is granted; and it is further

ORDERED that defendant Lipper & Company L.P.'s cross-motion for partial summary judgment is denied; and it is further

ORDERED that the matter is to be set down for a hearing for the assessment of damages, interest, costs, disbursements, and attorneys' fees; and it is further

ORDERED that, on or before November 30, 2004, plaintiff 101 Park Avenue Associates is to serve a copy of this Order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (60 Centre Street, Room 158), and shall pay the proper fees, if any, and all parties are directed to appear before Justice Carol Edmead, Part 35, 60 Centre Street, Room 543 on December 28, 2004 at 10:00 AM; and it is further

Dated: 10/8/2004

PAGE 1 OF 2

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

J.S.C.


Check if appropriate: DO NOT POST

PAPERS NUMBERED
1-7
FILED
12-15
OCT 19 2004
NEW YORK COUNTY CLERK'S OFFICE

* 2]
ORDERED that counsel for plaintiff 101 Park Avenue Associates is to serve a copy of this Order, together with Notice of Entry, upon defendant Lipper & Company L.P. within 20 days from the date of entry of this Order.

This constitutes the Decision and Order of the Court.

Page 2 of 2
Dated: October 8, 2004



Hon. Carol Edmead, J.S.C.

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OCT 19 2004
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X

101 PARK AVENUE ASSOCIATES,

Index No. 107092/04

Plaintiff,

DECISION/ORDER

-against-

LIPPER & COMPANY, L.P.,

Defendant.

-----X

HON. CAROL EDMEAD, J.S.C.

In this action for breach of contract and account stated, plaintiff 101 Park Avenue Associates ("101 Park") moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor in the amount of \$992,611.50, representing rent and other charges owed to it by defendant Lipper & Company, L.P. ("Lipper") for the period January 1, 2004 through July 31, 2004. Lipper cross-moves, also pursuant to CPLR 3212, for an order granting partial summary judgment in its favor barring 101 Park from seeking damages after May 2004.

Based upon the parties' submissions, it appears that the undisputed facts of this case are that on April 5, 2002, 101 Park, as landlord, and Lipper, as tenant, entered into a ten-year commercial lease agreement (the "lease") for the sixth floor of the building located at 101 Park Avenue, New York, New York (the "subject premises"). The subject premises were subsequently vacated by Lipper on or about December 31, 2003 and remain vacant to this day. 101 Park Avenue commenced the instant action by summons and complaint dated May 3, 2004 to which Lipper, by answer dated June 25, 2004, asserted the following affirmative defenses: (1) the complaint fails to state a cause of action; (2) illegality; and (3) plaintiff failed to take adequate actions, in accordance with the law, to relet the subject premises. Lipper did not plead

any factual allegations in support of these affirmative defenses.

In moving for summary judgment, 101 Park contends that the three affirmative defenses asserted in Lipper's answer are conclusory, entirely without merit and should be dismissed. Specifically, 101 Park argues that Lipper's first affirmative defense, failure to state a cause of action, is the epitome of a conclusory allegation and cannot be interposed in an answer. 101 Park contends that its ability to respond to Lipper's second affirmative defense, illegality, has been unduly prejudiced by Lipper's failure to plead any facts in support of that defense. 101 Park further argues that Lipper's third affirmative defense, failure to mitigate damages, cannot stand because Lipper failed to plead facts in support of that defense and because it is well settled under New York law that a commercial landlord is under no obligation to mitigate damages when a tenant vacates a premises prior to the expiration of the lease. Moreover, 101 Park claims that it cannot be disputed that Lipper was a tenant of the subject premises pursuant to a commercial lease, that it vacated the premises prior to the expiration of the lease, and that it failed to pay rent and other charges due to 101 Park totaling \$992, 611.52¹.

In opposition, Lipper acknowledges the general rule that a commercial landlord is under no duty to mitigate damages, but argues that the rule is inapplicable to the case at bar because the parties' lease imposes upon 101 Park a duty to mitigate damages. Claiming that the obligations of a commercial tenant and a commercial landlord following the tenant's vacatur are subject to whatever is provided in the lease agreement, Lipper argues that the instant lease obligates 101

¹ 101 Park also contends that it is entitled to any additional amounts that accrue through the date of judgment and that Lipper is obligated, pursuant to paragraph thirty of the lease, to pay 101 Park the reasonable attorneys' fees it incurs in prosecuting this action. Thus, 101 Park also requests that the Court schedule a hearing to determine the amount of attorneys' fees it is entitled to recover from Lipper.

Park to make a good faith attempt to relet the subject premises. Lipper further contends that the instant lease contains neither an acceleration clause, which Lipper claims would require an acceleration of the rents owed to 101 Park but would not require 101 Park to mitigate damages, nor a survival of liability clause which Lipper claims would have provided for its liability for the duration of the lease term, regardless of whether 101 Park was required to relet the subject premises. Lipper argues that whether 101 Park made the good faith attempt to relet the subject premises required by the lease is a question of fact that cannot be resolved on a motion for summary judgment.

In support of its motion for partial summary judgment, Lipper argues that 101 Park is barred, as a matter of law, from seeking damages after May 2004. Claiming that the lease provides that 101 Park may bring actions after Lipper has vacated the subject premises, but only from "time to time" and only for monies payable "upon the due dates therefor specified [in the lease]," Lipper contends that the lease, by its terms, caps 101 Park to damages, if any, at the date 101 Park commences a suit. Because 101 Park served its complaint in May 2004, Lipper argues that no recovery may be had in this action by 101 Park beyond that time. Lipper contends that absent an order limiting 101 Park's recovery in this action, the meaning and intent of the lease provision limiting when 101 Park can sue would be eviscerated and Lipper would be unfairly prejudiced.

In reply, 101 Park argues that the lease does not impose an obligation upon it to mitigate damages. Rather, 101 Park contends that the lease simply allows, but does not require it to relet the subject premises and apply the rents received from that reletting to the unpaid rents owed by Lipper. 101 Park also argues that, contrary to Lipper's claim, the lease does provide for the

survival of Lipper's liability in the event the lease is terminated by providing 101 Park with the option to either accelerate the amount due in accordance with a specified formula or to collect damages in the amount of rent due under the lease less any amounts collected by 101 Park if the subject premises is relet. Moreover, according to the affidavit of Richard Nasti, Vice President of 101 Park's general partner, PSK Operating Corporation, 101 Park, although under no legal obligation to do so, attempted to mitigate its damages following Lipper's premature vacatur by listing the subject premises on the HJ Kalikow & Co., LLC website, with CoStar and MrOfficeSpace, with internet listing services for commercial real estate, and with various major real estate brokerage firms, and by showing the subject premises to numerous prospective tenants.

In opposition to Lipper's cross-motion, 101 Park argues that the lease provision allowing 101 Park to commence suits for damages "from time to time at its election" does not bar the Court from awarding 101 Park damages through the date of judgment. Park 101 argues that at the very least, it is entitled to damages through the date it submitted its motion for summary judgment and expressly seeks to amend its complaint to include all amounts owed it through the date of judgment.

By way of a letter brief dated September 8, 2004, Lipper contends that by admitting that it has attempted to mitigate its damages in the wake of the premature termination of the lease, and by requesting damages "through the date of submission" or "through the date of judgment" 101 Park has conceded that issues of fact exist. Accordingly, Lipper argues that 101 Park's motion for summary judgment should be denied and its motion for partial summary judgment granted.

Analysis

“It is well settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, advancing sufficient evidence to demonstrate the absence of any material issues of fact” (*Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). “Once that initial burden has been satisfied, the burden of production shifts to the party opposing the motion to produce sufficient evidence of the existence of a material issue of fact requiring a trial of the action” (*Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226, 750 NYS2d 1 [1st Dept 2002]). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned, since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 461 NYS2d 342 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 385 NE2d 1238, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 383 NE2d 876, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 298 NE2d 96, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]). Where the moving party, however, has failed to establish that no issues of material fact exist, the motion must be denied regardless of the sufficiency of the opposing papers (*Silverman*, 307 AD2d at 231). The court’s

role in passing on a summary judgment motion is solely to determine if any triable issues of fact exist, not to determine the merits of any such issues. (*Grossman*, 298 AD2d at 226). “Because summary judgment is a drastic measure that deprives a party of her day in court, the motion should be denied if there is any doubt as to the existence of a triable issue (*Grossman*, 307 AD2d at 226).

Beginning with Lipper’s third affirmative defense, that 101 Park failed to take adequate action to relet the subject premises, it is well settled under the New York law that a commercial landlord has three options in the event a tenant abandons a premises prior to the expiration of the lease (*Holy Properties Ltd., L.P. v Kenneth Cole Prods.*, 87 NY2d 130, 133, 661 NE2d 694, 637 NYS2d 964 [1995]). A landlord’s first option is to do nothing and collect the full rent under the lease (*Holy Properties Ltd., L.P.*, 87 NY2d at 134). As a second option, a landlord may choose to accept the tenant’s surrender, reenter the premises and relet it for its own account, thereby releasing the tenant from further liability for rent (*Holy Properties Ltd., L.P.*, 87 NY2d at 134). A commercial landlord may also elect to notify the tenant that it was entering and reletting the premises for the tenant’s benefit (*Holy Properties Ltd., L.P.*, 87 NY2d at 134). If a landlord elects this third option and relets the premises for the tenant’s benefit, the rent collected by the landlord is to be apportioned first to repay the landlord’s expenses in reentering and reletting and then to pay the tenant’s rent obligation (*Holy Properties Ltd., L.P.*, 87 NY2d at 134). In announcing these options, the Court of Appeals noted that the law imposes upon a party injured by a breach of contract “the duty of making reasonable exertions to minimize the injury” (*Holy Properties Ltd., L.P.*, 87 NY2d at 134), but explained that leases are not subject to this general rule because, unlike executory contracts, leases have historically been recognized as present

transfers of estates in real property (*Holy Properties Ltd., L.P.*, 87 NY2d at 134). What is equally clear, though, is that the parties to a commercial lease are free to contract around this “no duty to mitigate rule” and to require a commercial landlord to mitigate its damages in the event a tenant vacates prior to the expiration of the lease (*see 85 John St. Pshp. v Kaye Ins. Assocs., L.P.*, 261 AD2d 104, 105, 689 NYS2d 473 [1st Dept 1999] [landlord owed no duty to relet the premises in order to mitigate damages, either in law or under the leases]; 4-27 New York Practice Guide: Real Estate § 27.04 [it is essential for a commercial tenant to negotiate a lease provision under which the landlord agrees to use reasonable efforts to mitigate damages]).

Section 27.01 [b] of the instant lease states that in the event the lease is terminated or 101 Park reenters the subject premises, Lipper shall pay as damages to 101 Park

sums equal to the fixed rent and additional rent . . . payable hereunder which would have been payable by [Lipper] had this lease not so terminated or had [101 Park] not so re-entered the Demised Premises . . . provided, however, that if [101 Park] shall relet the Demised Premises during said period, [101 Park] shall credit [Lipper] with the net rents received . . . from such reletting

The section further provides that

[i]f the Demised Premises . . . should be relet in combination with other space, then proper apportionment on a square foot basis . . . shall be made of the rent received from such reletting and of the expenses of reletting.

Employing a practical interpretation of the language used by the parties so that there may be a realization of their “reasonable expectations” (*Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460, 435 NE2d 1075 [1982]), it is apparent that section 27.01 [b] is written in a permissive, hypothetical tense, and not a mandatory one. That is to say, section 27.01 [b]

provides for an offset of 101 Park's damages *if* 101 Park elects to relet the subject premises. The section does not, however, impose upon 101 Park a duty to make a good faith effort to mitigate its damages following a premature vacatur by its tenant, Lipper. Lipper points to, and the Court has found no express language in the lease requiring 101 Park to relet the subject premises or undertake any other efforts to mitigate its damages. As 101 Park is not required by either the law or the lease to mitigate its damages, it is of no moment that 101 Park actually attempted, though unsuccessfully, to relet the subject premises. Lipper's third affirmative defense, therefore, is dismissed.

Lipper's second affirmative defense, illegality, must also be dismissed as bare legal conclusions are insufficient to raise an affirmative defense (*Comm'rs of the State Ins. Fund v Photocircuits Corp.*, 2 Misc3d 300, 313, 773 NYS2d 190 [Sup Ct New York County 2003]; *Robbins v Grownney*, 229 AD2d 356, 358, 645 NYS2d 791 [1st Dept 1996]; CPLR § 3013).

As to Lipper's first affirmative defense, there is a difference of opinion between the Appellate Division, First Department and the Appellate Division, Second Department as to whether an answer can include the affirmative defense that the complaint fails to state a cause of action (1 NY Civil Practice: CPLR P 3211.41). The Second Department has concluded that this defense cannot be interposed in an answer but must be raised by appropriate motion pursuant to CPLR § 3211 [a] [1] (*Petracca v Petracca*, 305 AD2d 566, 567, 760 NYS2d 513 [2d Dept 2003]). The First Department, in contrast, has held that the complaint's failure to state a cause of action may be raised as an affirmative defense in an answer (*Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352, 393 NYS2d 4 [1st Dept 1977]). Although it agrees with the Second Department's reasoning that interposing this defense in an answer is mere surplusage, the First

Department has nevertheless concluded that including the defense in an answer is not prejudicial but simply gives notice to the plaintiff that the pleader may, at some point in the future, move to dismiss the complaint on the ground that it fails to state a cause of action (*Riland*, 56 AD2d at 352). There is, however, no indication that the First Department has done away with the mandate of CPLR § 3013 that “[s]tatements in a pleading shall be sufficiently particular to give the court and the parties of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” Therefore, Lipper’s bare legal conclusion that 101 Park’s complaint fails to state a cause of action is also dismissed (*Comm’rs of the State Ins. Fund*, 2 Misc3d at 313; *Robbins*, 229 AD2d at 358).

As to Lipper’s cross-motion for partial summary judgment, section 27.02 of the lease provides that “[s]uit or suits for the recovery of such damages, or any installments thereof, may be brought by [101 Park] from time to time at its election, and nothing contained herein shall be deemed to require [101 Park] to postpone suit until the date when the term of this lease would have expired” More importantly, the section further provides that “[n]othing herein contained shall be construed to limit or preclude recovery by [101 Park] against [Lipper] of any sums or damages to which . . . [101 Park] may lawfully be entitled by reason of any default hereunder on the part of [Lipper].” Thus, Lipper’s claim that the lease provision allowing 101 Park to bring suit, but only from time to time, limits 101 Park to damages as of the date of suit is without merit and Lipper’s cross-motion for partial summary judgment is denied.

Accordingly, it is hereby

ORDERED that plaintiff 101 Park Avenue Associates’ motion for summary judgment is granted; and it is further

ORDERED that defendant Lipper & Company L.P.'s cross-motion for partial summary judgment is denied; and it is further

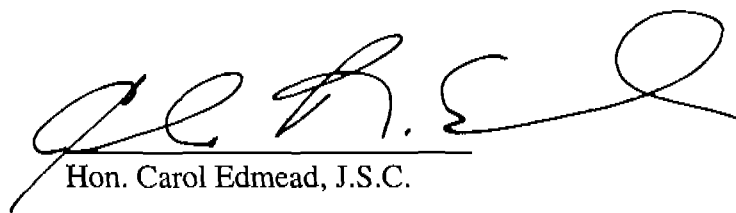
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ORDERED that, on or before November 30, 2004, plaintiff 101 Park Avenue Associates is to serve a copy of this Order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (60 Centre Street, Room 158), and shall pay the proper fees, if any, and all parties are directed to appear before Justice Carol Edmead, Part 35, 60 Centre Street, Room 543 on December 28, 2004 at 10:00 AM; and it is further

ORDERED that counsel for plaintiff 101 Park Avenue Associates is to serve a copy of this Order, together with Notice of Entry, upon defendant Lipper & Company L.P. within 20 days from the date of entry of this Order.

This constitutes the Decision and Order of the Court.

Dated: October 8, 2004



Hon. Carol Edmead, J.S.C.

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