

NNA Restaurant Management LLC v Eshaghian

2004 NY Slip Op 30302(U)

July 19, 2004

Supreme Court, New York County

Docket Number: 602568/02

Judge: Eugene Oliver

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

PRESENT: J. V. Anderson
Justice

PART 47

NINA RESTAURANT

INDEX NO.

202568/02

MOTION DATE

7/3/04

MOTION SEQ. NO.

006

MOTION CAL. NO.

4

- v -
MARREKH ESHAGHIAN

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

*and cross motion
have been decided in accordance
with the accompanying memorandum
decision*

FILED

AUG - 5 2004

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/19/04

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X

NNA RESTAURANT MANAGEMENT LLC

Index No. 602568/02

Plaintiff,

DECISION AND ORDER

-against-

E. IKE ESHAGHIAN and MAHROKH ESHAGHIAN

Defendants,

-and-

NOLITA OASIS, INC.

Intervenor-Defendant

----- X

PAULA J. OMANSKY, J.:

In this action for a "Yellowstone Injunction" and related relief, defendant Mahrokh Eshaghian as executrix for the estate of the late defendant E. Ike Eshaghian and on behalf of the estate (the "Eshaghian Defendants") move for an order declaring that intervenor defendant Nolita Oasis, Inc. ("Nolita") rescinded the asset purchase agreement dated July 10, 2002. In addition, the Eshaghian Defendants move to dismiss Nolita's first and second cross claims for tortious interference with contract on the ground that Nolita rescinded the asset purchase agreement between itself and plaintiff NNA Restaurant Management LLC.

The Eshaghian Defendants also move to vacate the Yellowstone injunction previously granted and for an order directing plaintiff to pay immediately all basic rent and additonal rent arrears due in the sum of \$78,426.98 for the subject premises from January 1, 2003

Mahrokh Eshaghian's co-executrix is Tanaz Eshaghian

through June 1, 2004 as set forth on Exhibit 1 annexed hereto and all current rent and additional rent paid when due. The Eshaghian Defendants also move for an order directing plaintiff to pay legal fees to date, with interest, in the amount of \$59,072.75 pursuant to section 22 of the lease between plaintiff and the Eshaghian Defendants.

Nolita cross-moves, pursuant to 22 NYCRR 202.12(e) for an order vacating the Note of Issue and Certificate of Readiness filed on June 1, 2004 and for a further order requiring the Eshaghian Defendants to properly respond to Nolita's second notice for discovery and inspection, and appear, along with the other parties herein, for the taking of depositions and for such and other further relief

FACTS

The facts have been stated in numerous prior orders. Plaintiff is the current assignee of a commercial lease to restaurant premises located at 98 Kenmare Street, which has been vacant for almost two years since the plaintiff ceased to operate a restaurant on the premises. In July 2002, plaintiff as seller, executed a contract of sale with Nolita, as buyer for plaintiff's restaurant business located at the subject premises. Plaintiff duly requested the Eshaghian Defendants' permission to assign the lease to Nolita. The Eshaghian Defendants denied permission in a letter dated August 2, 2002, based on lack of information about the proposed assignee, Nolita. The parties dispute whether the Eshaghian Defendants reasonably withheld permission to assign the

lease in order to interfere with plaintiff's contract of sale.

The Eshaghian Defendants maintain that as of April 26, 2002, (2½ months prior to signing the Asset Purchase Agreement), plaintiff failed to make rent and additional rent payments between January 1, 2001 and April 30, 2002. Furthermore, the Eshaghian Defendants states that the premises were not being utilized as a restaurant and, in fact, the premises had been for all intents and purposes left vacant, attracting vagrants and vandals.

No evidence had been presented to the court that the premises have been vandalized or damaged by plaintiff's alleged absence from the site.

The Eshaghian Defendants now allege that Nolita rescinded its Asset Purchase Agreement with plaintiff by serving a second amended answer and cross-claims in response to plaintiff's second amended complaint dated March 18, 2004. The Eshaghian Defendants argue that the demand to reduce the purchase price constitutes a rescission of the agreement.

Nolita acknowledges that plaintiff was required to pay the base rent and additional rent promptly on the first day of each month in advance and without demand by the Eshaghian Defendants. In addition, plaintiff was to ensure the premises remain occupied at all times in accordance with the lease, use the lease exclusively as a restaurant, pay all utility charges incurred by plaintiff and maintain in full force and effect proper insurance.

Nolita denies claims that it is seeking to rescind the agreement to purchase the plaintiff restaurant, characterizing the

Eshaghian defendants allegations as "ludicrous." Nolita also states that it did not reject the settlement offer and that it was fully involved with negotiations. However, Nolita maintains that plaintiff made false representations and that if the former had known of the falsity of the latter's statements, the former would not have entered into the Asset Purchase Agreement at the price set forth therein.

At the beginning of July 2003, plaintiff and the Eshaghian Defendants were in the process of negotiating a settlement pursuant to which plaintiff would pay the Eshaghian Defendants the sum of \$125,000.00 plus additional sums in return for defendants' giving their consent. Nolita claims that it did not receive a copy of this proposed settlement agreement until August 16, 2003. The parties then engaged in further discussions and drew up an updated assignment and assumption agreement reflecting various changes. Copies of the proposed updated assignment/assumption were transmitted to all parties in this litigation. According to Nolita, it was willing to proceed with the closing and accepted the proposed assignment/assumption.

Nolita maintains that the Eshaghian Defendants decided not to enter into a new agreement and the proposed assignment/assumption agreement remains unsigned.

On June 16, 2004 plaintiff returned the \$30,000 initial deposit, required by the Asset Purchase Agreement, to Nolita. According to plaintiff's counsel, the security was returned because Nolita materially breached the contract by demanding a reduction in

the purchase price of the subject-lease as a precondition for closing. Nolita allegedly negotiated and deposited the \$30,000 check. Plaintiff maintains that this is further evidence that Nolita had no intention of abiding by the terms of the Asset Purchase Agreement.

DISCUSSION

Contrary to the Eshaghian Defendants' argument the First Department's decision in 331 East 14th St. LLC v 331 East Corp. (293 AD2d 361 [1st Dept], lv denied 98 NY2d 727, rearg denied 99 NY2d 532 [2002]), which dismissed plaintiff's action for specific performance, is not applicable to instance action. The plaintiff in 331 East 14th Street had previously commenced an action to reform or "rewrite" the contract in order to reduce the contract price. The prior reformation claim was denied on the ground that the proper remedy was rescission or damages (ibid.). The First Department held that plaintiff could not commence a second action for specific performance because

[t]he prior reformation action which was based on the premise that the contract as written should not be enforced because it did not conform to the parties' actual agreement, was a disaffirmance of the contract as written and inconsistent with a claim for specific performance thereof

(id. at 361 362). Also, the First Department held that the plaintiff in 331 East 14th Street had obtained an advantage by the delay, finding that reformation could not be used as a renegotiation tactic.

Here, plaintiff commenced the action seeking a declaration that the Eshaghian Defendants were unreasonably withholding their

consent to the assignment of the lease and for a judgment directing the defendants give their consent. Nolita joined the action and made an additional cross-claim against the Eshaghian Defendants for damages. Nolita then attempted to amend its answer to assert the claim for reduction of purchase price on the basis of fraud.

The court correctly held that plaintiff's alleged failure to perform all the terms of contract did not constitute a fraud. The proposed amendment was rejected by the court which held that

Nolita does not allege, and the record does not support a claim, that plaintiff owed Nolita a duty which is separate and apart from the duties outlined in the Asset Purchase Agreement (Krantz v Chateau Stores of Canada, Ltd., 256 AD2d 186, 187 [1st Dept 1998]). Nolita has not stated any fact which, if proven, would show that acceptance of the premises, even if it still contained the alleged violations, would cause Nolita economic harm, diminish its proposed leasehold, or prevent it from operating a restaurant at the site. Nolita also does not state that it has expended any funds to cure any default (see, MTI/The Image Group, Inc. v Fox Studios East, Inc., 262 AD2d 20, 22 [1st Dept 1999]).

(order February 5, 2004 at 15).

This court also rejects the Eshaghian Defendants' argument that Nolita's proposed amendment actually is a repudiation of the Asset Purchase Agreement or constitutes a cause of action for rescission (cf., G.G.F Properties, LLC v Yu MI Hong, 284 AD2d 427 [2d dept 2001]). Unlike the plaintiff in 331 East 14th Street (supra, 293 AD2d, at 361), Nolita was not disavowing the terms of the Asset Purchase Agreement or seeking to cancel it. Instead, Nolita was actually trying to uphold the terms of the Asset Purchase Agreement. As this court has previously held, Nolita's proposed amendment was actually a breach of contract claim since

Nolita alleged that the delay, coupled with plaintiff's alleged failure to remove the lease violation, harmed Nolita by diminishing the value of the leasehold. However, the court properly found that the proposed amended claim had no merit since the underlying Asset Purchase Agreement did not provide Nolita with a monetary damage claim for plaintiff's alleged failure to cure lease violations (see, order February 5, 2004 at, 15).

Even if this court had granted leave to amend to Nolita, any inconsistency in the amended pleadings would not have been fatal (see, Cohn v Lionel Corp., 21 NY2d 559, 562 [1968]). New York law permits parties to demand alternative relief in the same action (CPLR 3017) and permits parties to state claims and defenses in that same action "regardless of consistency" (CPLR 3014).

The present record also does not contain sufficient proof which would require this court to find as, a matter of law, that Nolita breached the Asset Purchase Agreement by demanding a reduction in purchase price and by accepting a return of initial deposit check. On the contrary, plaintiff decided to return Nolita's check prior to a demand from Nolita.

Plaintiff's recent claim that Nolita breached the Asset Purchase Agreement is not supported by the presented facts. There is no evidence presently before the court which proves that Nolita misrepresented its financial position and was unable to satisfy its part of the bargain when the Eshaghian Defendants initially refused the assignment (cf., Farahzad v Monometrics, 119 AD2d 721, 724 [2d Dept 1986]). In fact, the gravamen of the action is that plaintiff

was unable to assign the underlying lease agreement to Nolita due to the Eshaghian Defendants' refusal. This court has previously denied summary judgment on the main action because the record did not contain, and still does not contain, any evidence which either conclusively supports or refutes the Eshaghian Defendants' claim that Nolita is not an appropriate tenant or lacks the proper financial resources to perform under the lease.

That Nolita allegedly demanded a lower purchase price after months of delay does not, by itself, constitute a breach given the fact that plaintiff has not yet been able to obtain the required consent from the Eshaghian Defendants. Nolita's purported objection to a later settlement offer, even if true, does not provide a basis for this court to conclude that Nolita should be barred now from enforcing the terms of the Asset Purchase Agreement. In order to encourage resolution of claims, New York law provides that evidence of compromise offers are inadmissible and may not be used to prove liability, the invalidity of claims, or the amount of damages (CPLR 4547; sec, CIGNA Corp. v Lincoln Natl. Corp., 6 AD3d 298, 304 [1st Dept 2004]). Accordingly, Nolita cannot be penalized because it unsuccessfully tried to settle the dispute.

The branch of the Eshaghian Defendants's motion to vacate the Yellowstone injunction is denied. Although it appears that the parties are no longer negotiating a transfer of the lease and apparently have chosen to continue litigating solely on the issue of monetary damages, plaintiff has not stated an intention to

terminate its underlying lease with the Eshaghian Defendants. Because plaintiff returned Nolita's deposit and because of the existence of cross claims between plaintiff and intervenor, the posture of this case has changed. Given the fact that rent/additional rent arrears continue to accumulate, this court shall require that an undertaking in the amount of \$30,000 be posted within 15 days after the date of this order. If the bond is not posted by August 4, 2004, proof to be filed with the court and the parties, the Yellowstone injunction shall be automatically dissolved and the Eshaghian Defendants shall be legally entitled to terminate its lease in accordance with its provisions.

That branch of the Eshaghian Defendants' motion for an award of rent/additional rent is denied at this juncture. This Court is unable to determine upon the present record, the parties' conflicting claims to monetary damages, including the amount of basic rent and additional rent which plaintiff allegedly owes the Eshaghian Defendants.

Nolita's cross motion to vacate the Note of Issue and the Certificate of Readiness is denied. Whatever additional discovery is required shall be completed within 60 days of service of a copy of this order with notice of entry.

The remaining branches of Nolita's cross motion are denied since neither side states whether the Eshaghian Defendants have complied with prior discovery requests during the pendency of these applications. Trial date and any remaining discovery issues are to be determined at a conference to be held on August 6, 2004 at 11:00

a.m.

Accordingly, it is

ORDERED that the branches of the Eshaghian Defendants' motion which seek declaratory relief, dismissal of Nolita's first and second cross claims, vacatur of the Yellowstone injunction and an award of rent/additonal rent from plaintiff are denied for the reasons stated herein; and it is further

ORDERED that to continue the Yellowstone injunction, an undertaking is fixed in the sum of \$30,000; and it is further

ORDERED that such undertaking shall be posted within 15 days of the date of this order, and plaintiff shall file copies of proof of service with the court and with the parties. Plaintiff's failure to post bond by August 4, 2004 shall result in the automatic dissolution of the Yellowstone injunction and the Eshaghian Defendants shall be legally entitled to terminate its lease in accordance with its provisions; and it is further

ORDERED that Nolita's cross motion is denied for the reasons stated herein; and it is further

ORDERED that appropriate discovery shall continue, if necessary, but must be completed within 60 days of service of a copy of this corder with notice of entry; and it ifs further

ORDERED that the parties, including Tanaz Eshaghian, as the co-executrix of the estate of E. Ike Eshaghian, are directed to

