

Peach Parking Corp. v 346 West 40th Street, LLC

2005 NY Slip Op 30056(U)

September 27, 2005

Supreme Court, New York County

Docket Number: 0103096/2004

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB Justice

PART 15

PEACH PARKING CORP.,

Plaintiff,

- v -

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

Defendants.

INDEX NO. 103096/2004

MOTION DATE

MOTION SEQ. NO. 009

MOTION CAL. NO.

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

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 is decided in accordance with the accompanying memorandum decision and order.

FILED
OCT 07 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/22/05

WALTER B. TOLUB

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

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PEACH PARKING CORP.,

Plaintiff,

-against-

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

Defendants.
-----x

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WALTER B. TOLUB, J.:

Defendant The Hertz Corporation ("Hertz") moves to amend its answer to assert counterclaims for partial constructive eviction and fraud in the inducement of its sublease.

The parties to this action dispute the responsibility under various leases to make repairs to the subject premises. Defendant 346 W. 40th Street LLC leases the premises to Kinney System, Inc. ("Kinney") under a prime lease. Kinney subleases the premises to Peach Parking Corp. Peach subleases the premises to Hertz. Hertz operates the parking garage at the premises.

"It is well settled that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay" (*Ancrum v. St. Barnabas Hosp.*, 301 A.D.2d 474, at 475 [1st Dept. 2003]). However, leave to amend the pleading will be denied where an examination of the proposed pleading establishes that the pleading is palpably insufficient as a matter of law (*id.*). The amendment must be permitted unless its "lack of merit

is clear and free from doubt" (*Hawkins v. Genesee Pl. Corp.*, 139 AD2d 433, 434 [1st Dept. 1988]).

A motion to amend must be supported by an affidavit of merit and proof that could be considered on a motion for summary judgment (*Zaid Theatre Corp. v. Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept. 2005]). While Hertz's initial motion did not contain an affidavit of merit, Hertz submitted an affidavit from a party with knowledge of the underlying transaction in reply to the opposition. The court will deem this affidavit proof in admissible form of the content of the proposed amended answer. Thus the court will only address the sufficiency of the proposed amended answer.

Hertz's motion for leave to amend the complaint to assert a cause of action for partial constructive eviction is denied. Partial constructive eviction may be asserted by a tenant as a defense in an action for nonpayment of rent where the tenant abandons only a portion of the demised premises where the acts of the landlord make that portion unusable (*Minjak Co. v. Randolph*, 140 AD2d 245 [1st Dept. 1988]). The claim may only be asserted defensively (*Elkman v. Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept. 1996]). Because Hertz does not assert partial constructive eviction as a defense, but rather seeks affirmative relief, the amendment is palpably improper and must be denied.

Hertz's motion for leave to amend the answer to include

[*4]

fraud in the inducement is granted. Hertz alleges that Peach Parking, Kinney and 346 West 40th Street, LLC represented in writing that there were no defaults under the prime lease and first sublease prior to its entering into its sublease. Hertz alleges that these parties knew that their were defaults at the time Hertz entered into the sublease and that therefore it was fraudulently induced to enter into the sublease.

"A fraud claim that merely restates a breach of contract claim may not be maintained" (*Orix Credit Alliance, Inc. v. R.E. Hable Co.*, 256 AD2d 114, 115 [1st Dept. 1998]). To establish a claim for fraud separate from an agreement, a party must allege misrepresentations of a present fact that was collateral to the agreement and that induced the defrauded party to enter into the agreement (*id.*).

Plaintiff and co-defendants represented to Hertz in writing that there were no known defaults under the prior agreements relating to the subject premises. This constitutes a representation of a present fact collateral to Hertz's sublease. Hertz further alleges, and it is not without logic, that it relied on the representation that there were no defaults on the underlying leases when it agreed to its sublease. The parties in opposition to the motion have not established that this counterclaim is patently without merit. Therefore Hertz's motion to amend its answer to assert a counterclaim for fraud in the

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inducement must be granted. Accordingly, it is

ORDERED that The Hertz Corporation 's motion to amend its answer to assert a counterclaim for partial constructive eviction is denied; and it is further

ORDERED that The Hertz Corporation 's motion to amend its answer to assert a counterclaim for fraud in the inducement is granted; and it is further

ORDERED that The Hertz Corporation shall serve an amended answer in compliance with this decision and order within 30 days of entry of this order.

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

Dated:

9/27/05

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

FILED
OCT 07 2005
NEW YORK
COUNTY CLERK'S OFFICE