

Kronish Lieb Weiner & Hellman LLP v Tahari Ltd.

2005 NY Slip Op 30171(U)

May 17, 2005

Supreme Court, New York County

Docket Number: 0604183/2004

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB

PART 15

0604183/2004

KRONISH LIEB WEINER & HELLMAN
VS
TAHARI LTD.

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 _____

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.**

FILED

MAY 26 2005

Dated: 5/17/05

WALTER B. 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):

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

-----X
KRONISH LIEB WEINER & HELLMAN LLP,

Plaintiff,

TAHARI LTD.,

Index No. 604183/2004

Defendant.
-----X

WALTER B. TOLUB, J.:

Defendant Tahari Ltd. (Tahari) moves to dismiss the within complaint pursuant to CPLR 3211 (a) (1), (5), (7), and (10).

Plaintiff Kronish Lieb Weiner & Hellman (KLWH) is the tenant of the 46th and 47th floors of the Grace Building, located at 1114 Avenue of the Americas, pursuant to a lease dated May 12, 1993. The lease gives KLWH occupancy of the floors for the period beginning June 1, 2003 and ending April 30, 2014. Said lease also gives KLWH the option to lease the 48th floor of the subject building for the period beginning June 1, 2003 and ending April 30, 2014.

Non-party 1114 Trizechan-Swig. , LLC ("1114") is the owner and non-party W.R. Grace and Co. (Grace) was the prime tenant of the 33rd through 48th floor of the subject building, pursuant to a lease dated July 7, 1972. Said lease gave Grace occupancy of said floors for a period commencing May 7, 1973 and ending May 31, 2003. The defendant Tahari, by sublease dated February 23, 1996, sublet the 48th floor of the subject building from Grace, for a term that ended on May 31, 2003.

KLWH exercised its option to lease the 48th floor as of June 1, 2003. However, KLWH was unable to take possession of the 48th floor on June 1, 2004, when it took possession of the 46 and 47th floor, because Tahari held over. When Tahari held over, 1114 brought an ejectment action against Grace and Tahari. By order dated March 12, 2004, this court granted possession to 1114. Tahari then sought and obtained a stay from the ejectment order pending appeal. By order dated December 16, 2004, the Appellate Division, First Department affirmed the ejectment order. Upon Tahari's ejectment from the 48th floor, 1114 gave possession to KLWH.

KLWH brought this action against Tahari to recover for damages allegedly caused by Tahari's holding over. The complaint contains three causes of action. The first cause of action seeks to recover on a theory of tortious interference with contract. The second cause of action alleges a claim for unjust enrichment. The third cause of action is based on trespass.

Tahari now moves to dismiss the complaint on several different grounds. The court first turns to movant's claim that the complaint in its entirety is barred by the doctrine of collateral estoppel. Tahari argues that the decision in the prior holdover proceeding bars the instant action under the doctrine of collateral estoppel.

Collateral estoppel, or issue preclusion, prevents a party from 'relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party' [citation

omitted]. The doctrine applies if the issue in the second action was 'raised, necessarily decided and material in the first action,' and if the party 'had a full fair opportunity to litigate the issue in the earlier action.' [citation omitted]".

Pinnacle Consultants, Ltd. v Leucadia National Corp., 94 NY2d 426 (2000).

KLWH is not seeking to relitigate any of the issues decided in the holdover proceeding. On the contrary, KLWH's action is based on this court's decision in the holdover proceeding that found that Tahari had no right to hold over. Moreover this court, in its order of March 12, 2004 in the holdover proceeding, found that, even if Tahari had valid equitable claims against 1114 and Grace based on alleged oral promises and representations made by 1114 and Grace, these claims would not give Tahari superior rights over KLWH to possession of the 48th floor. Since KLWH's possessory rights were superior to Tahari's, KLWH had the right to possession and Tahari had no right to hold over. Accordingly, the court ejected Tahari from the premises, but severed Tahari's equitable claims and allowed them to continue so that Tahari could seek money damages against Grace and 1114. A finding that KLWH was entitled to damages against Tahari in this would not be inconsistent with Tahari obtaining damages against 1114 and Grace in the other action.

For the forgoing reasons, this branch of the motion must be denied.

Tahari's motion to dismiss based on its claim that 1114 is a necessary party under CPLR 1001 is also denied. In order to warrant dismissal for failure to join a necessary party, defendant has to demonstrate that the party's joinder is necessary to accord full relief to the parties presently joined, or that the party would be inequitably affected by any judgment that might result in the action. Amsellem v Host Marriott Corp., 280 AD2d 357 (1st Dept 2001).

Defendant has not demonstrated that 1114 is a necessary party under this standard. The issue of possession of the premises has already been decided. The issue before the court in the instant action is whether KLWH is entitled to recover from Tahari for damages to it caused by Tahari's holding over. There is no reason why the parties herein cannot be afforded full relief without joining 1114 to the action. Nor will 1114 be inequitably effected by any judgment that might result from this action. As stated earlier, KLWH's right, if any, to recover damages from Tahari, and Tahari's right, if any, to recover damages from 1114, are independent of each other.

Defendant moves to dismiss the first cause of action on the ground that plaintiff fails to allege a proper cause of action for tortious interference with contract. A cause of action for tortious interference with contract requires plaintiff to plead four elements: (1) the existence of a valid contract between

plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach the contract; and (4) damages to plaintiff. Kronos, Inc. v AVX Corp., 81 NY2d 90 (1993).

The complaint fails to allege that Tahari's actions induced 1114 to breach its contract with KLWH. On the contrary, when Tahari held over, 1114 brought a holdover proceeding against Tahari and Grace so that it could recover possession of the subject premises, and give possession to KLWH and upon recovering possession, 1114 did give possession to KLWH. Accordingly the first cause of action is dismissed.

Plaintiff's second cause of action for unjust enrichment must also be dismissed. To state this cause of action, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant obtained such benefit without adequately compensating plaintiff for it. Nakamura v Fujii, 253 AD2d 387 (1st Dept 1998). The complaint fails to allege any benefit conferred upon defendant by plaintiff. Tahari paid use and occupancy to 1114 in the amount as determined by the court in the holdover proceeding to be the fair market value of the subject premises. In any event, it is 1114, and not KLWH, who is entitled to payment for use and occupancy since it was 1114 that was conferring the benefit, albeit against its will, on Tahari.

Defendant's motion to dismiss plaintiff's third cause of action is denied. A trespass occurs where there is interference with a person's right to possession of real property either by an unlawful act or by lawful act performed in an unlawful manner. Kurzner v. Sutton Owners Corp., 245 AD2d 101 (1st Dept. 1997). Where there is injury to possession, an action may be maintained even against a landlord. Steinfeld v. Morris, 258 AD 228 (1st Dept. 1939). Plaintiff's complaint sufficiently alleges injury to possession to state a cause of action for trespass. Accordingly, it is

ORDERED that plaintiff's motion to dismiss is granted and the first and second causes of action are dismissed; and it is further

ORDERED that plaintiff's third cause of action is severed and shall continue; and it is further

ORDERED that defendant shall serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Counsel for the parties shall appear for a preliminary conference at I.A. Part 15, Room 335, 60 Centre St., New York NY on June 24, 2005 at 11:00 a.m.

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

Dated: 5/17/05



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

FILED
 MAY 26 2005

CLERK OF COURT