

**Nextel of N.Y., Inc. v 87-10 51st Ave. Owners Corp.**

2005 NY Slip Op 30422(U)

June 6, 2005

Supreme Court, Queens County

Docket Number: 6398/2004

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

-----x BY: Janice A. Taylor, J.  
NEXTEL OF NEW YORK, INC.,

Plaintiff(s), Index  
Number 6398/2004

- against -

Motion  
Date 03/07/05

87-10 51<sup>st</sup> AVENUE OWNERS CORPORATION,

Motion  
Cal. Number     

Defendant(s).

-----x

The following papers numbered 1 to 16 read on this motion by the plaintiff for an order awarding it summary judgment on its first, second, and third causes of action and dismissing defendant's first, second, third, fourth and fifth counterclaims; and a cross-motion by the defendant for an order dismissing the plaintiff's first, second, and third causes of action.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

The court deems the defendant's notice of motion for partial summary judgment to be a cross-motion to the plaintiff's motion, and further considers the defendant's affirmation in further support to constitute a reply, and hereby consolidates both motions for decision herein.

Plaintiff's motion for summary judgment on its first, second, and third causes of action compelling the defendant to execute applications for building permits in order to legalize all previously performed work in the building by plaintiff, including the installation of conduit through the compactor chute in accordance with plans previously submitted to defendant in March 2004 is granted.

Without the defendant's cooperation, the plaintiff will be

unable to attempt to cure the violations alleged and complained of by the defendant in its notice to cure, thereby rendering otiose the *Yellowstone* stay previously granted in this case. The court rejects the owner's conclusory claim that the violations are incapable of being cured, or that the amended plans fail to comply with the building code, as unsupported by admissible evidence, and unfounded by the record. Moreover, permitting the tenant to attempt to cure building code violations would not require this court to give effect to, or to espouse, an illegal contract, as urged by defendant-owner. The owner essentially provides no excuse for failing to cooperate with the tenant in its efforts to legalize its modifications, which were approved by owner's prior President, Alvin Brockway, as demonstrated by the latter's having signed off on the subject plans. In light of the owner's lack of cooperation, it cannot utilize these violations as a subterfuge to end the tenancy herein, a notion which this court already rejected, in its November 30, 2004 Memorandum, as an unwarranted forfeiture of an important leasehold interest (see, *Lake Anne Realty Corp. v. Sibley*, 154 A.D.2d 349 [2d Dept. 1989]).

In "every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part" (*Chemical Bank v. Stahl*, 272 A.D.2d 1 [1<sup>st</sup> Dept. 2000], quoting *Patterson v. Meyerhofer*, 204 N.Y. 96, 100 [1912]), a concept "rooted in notions of common sense and fairness" (*Wieder v. Skala*, 80 N.Y.2d 628, 637 [1992], referencing Farnsworth, *Contracts* § 7.16, at 524 [1982]).

In *Chemical Bank v. Stahl*, the court noted that:

Conduct affirmatively preventing the other party from performing would materially breach the lease. The need for the landlord's cooperation in this regard can also be viewed as a constructive condition to the tenant's own duty to perform exit work. The landlord's obstructive conduct, then, would excuse the tenant's performance of its lease obligation, and a continuing refusal by the landlord would ultimately discharge the tenant's obligation (see generally, Restatement [Second] of Contracts §§ 225 ["Effects of the Non-Occurrence of a Condition"], 226 ["How an Event May Be Made a Condition"], and comment c thereto, and 237 ["Effect on Other Party's Duties of a Failure to Render Performance"], and comments a and b thereto). As such, in the present case, the discharge issue turns on whether the record supports the landlord's conclusory claim that it was justified in basically withholding consent to the tenant's exit work during the time period when consent was necessary.

(*Chemical Bank v. Stahl*, *supra* at 14-15; see also, *Morris v. 702*

*E. Fifth St. HDFC*, 8 A.D.3d 27 [1<sup>st</sup> Dept. 2004]; *AD 1619 LLC v. Colony Records & Radio Ctr., Inc.*, 305 A.D.2d 195 [1<sup>st</sup> Dept. 2003]; *Solow Bldg. Co., LLC v. Morgan Guar. Trust Co.*, 301 A.D.2d 440 [1<sup>st</sup> Dept. 2003]). The applicable provisions of the lease, *inter alia*, paragraph 6(a), entitled the plaintiff to undertake the alterations it performed, which had been previously approved by the owner's representative.

Even were that not the case, New York law permits a tenant to make certain non-structural alternations even without the landlord's consent if necessary to carry on the tenant's business (see, *Williams v. Ron-Jay Enterprises, Inc.*, 65 A.D.2d 213, 218 [4<sup>th</sup> Dept. 1978]; *Harar Realty Corp. v. Michlin & Hill, Inc.*, 86 A.D.2d 182 [1<sup>st</sup> Dept. 1982], *appeal dismissed* 57 N.Y.2d 607 [1982]).

Paragraph 3 of the subject lease proscribes the owner from unreasonably withholding its consent to the approval of plans. The court finds that the defendant's lack of cooperation frustrated the ability of the plaintiff to cure any violations resulting from its work, breached this provision of the lease, and thereby excused the plaintiff's performance. Thus, because the defendant has breached its implied covenant of good faith, and has interfered with plaintiff's ability to perform under the lease, plaintiff is entitled to summary judgment on its first three causes of action, requiring the owner to cooperate by signing required building- permit applications, and cooperating with the defendant in its efforts to cure any building violations.

Turning to plaintiff's request for the dismissal of defendant's first, second, third, fourth, and fifth counterclaims, the court finds as follows:

Since it is evident that defendant-owner refused to cooperate in the plaintiff's attempt to remedy the violation involving the placement of conduit in the compactor chute, based upon its unsupported claim that the plaintiff's efforts would be futile, it thereby breached the implied covenant of good faith, and cannot recover on its first counterclaim for damages proximately caused by its own lack of cooperation. Furthermore, the lease does not provide for the recovery of attorney's fees in the situation at bar. Even if paragraph 18 of the subject lease was intended to apply to a landlord-tenant dispute, which the court finds it was not, defendant's counsel has failed to raise a triable issue of fact as to the negligence of the plaintiff through his own conclusory and periphrastic averments; hence, the defendant's first counterclaim seeking recovery of attorney's fees is hereby dismissed.

Likewise, the record demonstrates that the defendant's uncooperative actions breached the implied condition of good

faith in the lease between the parties. The unsworn, inadmissible report of plaintiff's engineering firm, along with defense counsel's own averments, do not demonstrate a triable issue of fact with respect to whether or not the plaintiff also breached the covenant of good faith in the lease agreement between the parties. Thus, the defendant's second counterclaim for breach of the implied covenant of good faith must be dismissed.

The defendant's third counterclaim seeks recovery of damages from a leak allegedly caused by cable trays placed in close proximity to a roof drain. Movant has not established its entitlement as a matter of law to dismissal of this counterclaim. The report of plaintiff's engineer, O. Derrick Durgana, P.E. is not notarized, and hence, not in admissible form. On the other hand, the notarized affidavit of defendant's engineer, Dean Koutsoubis, P.E., attributes the damage to the defendant's roof to the plaintiff's installation of conduit raceway lines directly over a main drain on the defendant's roof (see, Affidavit of Dean Koutsoubis, P.E., at paragraph 11). Thus, there is an issue of fact as to whether the placement of plaintiff's cable trays caused and/or contributed to the leak and damages alleged by the defendant, mandating denial of plaintiff's motion for a dismissal of this counterclaim, and a trial thereon.

Likewise, the fourth counterclaim cannot be dismissed, since there is an issue of fact as to whether the leasehold, as contemplated, included the building's parking garage roof utilized by the plaintiff for the placement of its Heat Ventilation and Air Conditioning System ("HVAC"). Paragraph 1 of the lease specifies that the demised premises includes "approximately two hundred (200) square feet of interior space in the Building and space either adjacent to or on the roof of the Building and all access and utility easements, if any." The lease is silent as to the use of the parking garage roof, although, as noted by the plaintiff, the owner's representative signed off on plans showing the placement of air conditioning units on the subject garage roof, inspected the units, and raised no objection thereto for two (2) years. Thus, plaintiff has not demonstrated, as a matter of law, that this counterclaim should be dismissed, and a trial thereon is necessary.

The defendant's fifth counterclaim is hereby dismissed. The plaintiff has demonstrated an absolute right under the lease to place its antennas in the demised location for its unique business purposes, and that removing them would cause a hardship to its operations. The defendant offers only conclusory statements of counsel, and has not demonstrated, by admissible evidence, that the placement of the antennas was not done "in a good and workmanlike manner", or that said placement has caused structural problems to the parapet walls. The unsigned memorandum from defendant's expert does not suffice for this purpose. In addition, defense counsel's statements that the defendant "is not seeking to evict the plaintiff," and that "[s]pace will be

provided for its operations," (affirmation of Austin Graff, Esq. at p. 88), are extremely disingenuous, given the fact that defendant-owner is seeking to terminate the leasehold of the plaintiff.

Neither plaintiff nor defendant have established entitlement to judgment as a matter of law on the defendant's sixth counterclaim seeking damages for unpaid electrical services. This issue must be determined at trial.

The seventh counterclaim seeking attorney's fees is hereby dismissed. It is duplicative of the request for same, made in the first counterclaim, and, as explained *supra*, the lease does not provide for the recovery of attorney's fees in the event of a dispute between the owner and the tenant, nor has any issue been raised as to the plaintiff's negligence.

Based upon the foregoing, the plaintiff's motion for summary judgment awarding it judgment on its first, second, and third causes of action is granted; plaintiff's motion seeking dismissal of the defendant's first, second, third, fourth and fifth counterclaims is granted to the extent that the first, second, fifth and seventh counterclaims are dismissed; and defendant's cross-motion is denied in all respects.

The foregoing constitutes the opinion, decision, and order of the court.

Jamaica, New York  
Dated: June 6, 2005

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**JANICE A. TAYLOR, J.S.C.**