

Cellular Tel. Co. v Seneca Ins. Co.
2005 NY Slip Op 30535(U)
April 13, 2005
Supreme Court, New York County
Docket Number: 101582/2005
Judge: Karen S. Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

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CELLULAR TELEPHONE COMPANY and
NEW CINGULAR WIRELESS PCS LLC

Index no.: 101582/2005
Motion seq.: 002
Motion date: April 15, 2005

Plaintiffs,

-against -

SENECA INSURANCE COMPANY

DECISION AND ORDER

Defendant.

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PRESENT: KAREN S. SMITH, J.S.C.:

Defendant 210 East 86th Street Corporation's motion, pursuant to CPLR §§ 3211(a)(1) and (a)(7), for an order dismissing the complaint is hereby denied.

In this declaratory judgment action, plaintiffs Cellular Telephone Company ("CTC") and New Cingular Wireless PCS, LLC ("NCWP") seek a judgment declaring that defendant has not validly canceled a lease between itself and NCWP. Defendant now moves to dismiss the complaint on the ground that it fails to state a cause of action and that documentary evidence provides a complete defense to plaintiffs' claims.

The relevant facts are contained in the moving papers and are not in serious dispute unless otherwise noted. Defendant is the owner of a building located at 209-213 East 85th Street and 210-214 East 86th Street, New York, New York. As of September 30, 2004, plaintiff CTC was a New York partnership with two equal partners, Cellular Systems, Inc. ("Cellular") and LinCellular Communications (NY), LLC, ("LIN"). LIN owned a 96.671% share of Cellular. The remaining 3.329% share of Cellular was held by private individuals. LIN, in turn, was wholly owned by LinBroadcasting LLC, which was, at that time, an affiliate of AT&T Wireless Services, Inc. ("ATTWS"). Defendant contends that ATTWS had a controlling interest in LIN Broadcasting LLC.

On December 23, 1997, defendant entered into a lease agreement ("Lease") with plaintiff CTC for commercial space in defendant's building. The Lease term commenced on January 1, 1998 and lasted for five years. On December 18, 2001, CTC exercised an option to renew the lease for

another five years. Accordingly, the Lease is now set to expire on December 31, 2007.

Paragraph 49 of the lease contains the following provisions concerning assignment:

49.1 (a) Tenant shall not (i) assign or otherwise transfer this Lease of the term or estate hereby granted or (ii) sublet the Premises or any part thereof or allow the same to be used or occupied by others or in violation of any of the provisions of this Lease, without, in each instance, obtaining the prior written consent of Owner which such consent may be withheld for any reason (whether reasonable, unreasonable or arbitrary) or for no reason. **For purposes of this Article 49, the transfer of other disposition of in excess of twenty-five (25%) percent of the issued and outstanding capital stock of Tenant or any corporate tenant or subtenant, or the transfer of in excess of twenty-five (25%) percent of the total interest in any other entity (partnership or otherwise) which is Tenant or subtenant, however accomplished, whether in a single transaction or in a series of related or unrelated transactions, shall be deemed an assignment of this Lease or such sublease, as the case may be.** (Emphasis added.)

(b) Notwithstanding anything to the contrary in this Lease (but subject to all restrictions regarding the use of the Premises), provided and on condition that Tenant is not then in default under any provision of this Lease after receipt of notice thereof and the expiration of any applicable cure period which are specifically provided for in this Lease in respect of such default (if any), this Lease may be assigned and the Premises may be sublet, in whole or in part, from time to time, without Owner's consent (but with not less than thirty (30) days prior notice to Owner) (i) to any person into or with which Tenant or any successor of Tenant may be merged or consolidated or (ii) to any person which is an affiliate, parent or successor of Tenant.

49.5 Anything herein contained to the contrary notwithstanding, should Tenant desire to assign this Lease or sublet the Premises or any portion thereof, then Tenant shall send to Owner a written notice by registered mail, return receipt requested, at least thirty days prior to the date that Tenant intends such assignment or subletting to commence, setting forth the proposed commencement date of such assignment or subletting and in the case of subletting, the terms of such subletting. In the case of a subletting or a portion of the Premises, such notice shall be accompanied by a reasonably accurate floor plan of that portion of the Premises to be sublet. In the case of an assignment or subletting of the entire Premises, within thirty days after receipt of the aforesaid notice, Owner may notify Tenant that Owner elects (a) to cancel this Lease, in which event such cancellation shall become effective on the date set forth in Tenant's notice a the proposed commencement date of the proposed assignment or subletting, with the same force and effect as if said date were the expiration date of the Lease. . .

During the month of October 2004, LIN acquired the remaining shares of Cellular to hold a 100% interest in that company. Cellular then transferred all of its assets and liabilities to LIN and ceased to exist. According to papers filed by both sides, as a result of the dissolution of Cellular, CTC dissolved as a matter of law and merged with LIN. Both parties concede that LIN became the successor to CTC's interest in the Lease.

In December 2004, apparently as part of a broader corporate transaction, LIN merged with plaintiff NCWP, which a successor to LIN's interest in the Lease. During the same month, Cingular Wireless LLC acquired 100% of the shares of ATTWS. According to plaintiffs' papers, ATTWS changed its name to New Cingular Wireless Services and is now an indirect parent of plaintiff NCWP. Defendant alleges that, as a result of its acquisition of ATTWS, Cingular Wireless LLC now controls NCWP. Defendant alleges it was never notified of these transfers.

In a letter dated November 23, 2004, defendant notified CTC that it was terminating the Lease. In that letter, defendant stated that, as a result of a merger between ATTWS and a wholly owned subsidiary of Cingular Wireless LLC, CTC had assigned its rights under the lease to Cingular Wireless LLC. Since CTC failed to notify defendant timely, defendant announced that it was compelled to terminate the Lease. On January 11, 2005, defendant commenced a summary proceeding in the Civil Court of New York County to evict CTC. On February 3, 2005, CTC and NCWP commenced the instant declaratory judgment action. Defendant and plaintiffs have stipulated to mark the Civil Court summary proceeding off the calender pending resolution of this motion.

In this action, plaintiffs are seeking a judgment declaring that the Lease has not been effectively cancelled by defendant and that plaintiff NCWP is entitled to remain as a Tenant under the Lease for the remaining term. Specifically, plaintiffs contend that ATTWS was not a tenant under the Lease and as such, any purchase of its assets did not constitute an assignment. Further, plaintiffs contend that any assignment that did occur was permissible under the Lease and did not trigger defendant's right of termination.

Defendant now moves to dismiss the action on the grounds that, as a matter of law, Cingular Wireless LLC's purchase of 100% of ATTWS's stock was an assignment under the Lease, and that, regardless of the circumstances, an assignment by the tenant always triggers defendant's right of termination. Plaintiffs respond that the stock purchase could not have been an assignment of the

Lease, as ATTWS was never a tenant. Moreover, plaintiffs contend, were the sale an assignment, it would not trigger defendant's right of termination as it was a permissible assignment under the Lease.

CPLR § 3211 (a) (1) allows a defendant to dismiss the action as against him when he can demonstrate a defense founded upon documentary evidence. CPLR § 3211 (a) (7) allows the defendant to dismiss the action as against him when the plaintiff has failed to state a valid cause of action. On a motion to dismiss submitted pursuant to CPLR § 3211, the court accepts the facts as alleged in the complaint to be true and affords plaintiffs every possible favorable inference. (*Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP* 96 NY2d 300, 303 [2001].) The court will dismiss the claim only if documentary evidence conclusively establishes a defense as a matter of law. (*Id.*)

In order to prevail on its motion, defendant must show as a matter of law that (1) Cingular Wireless LLC's purchase of 100% of ATTWS's stock was an assignment and (2) such an assignment triggered defendant's right of termination. If no assignment occurred, then defendant would have no right of termination. Therefore, the court will first address the question of whether, under the terms of the Lease, an assignment occurred. If defendant cannot establish that an assignment did occur as a matter of law, then the motion to dismiss must be denied.

Defendant has not shown, as a matter of law, that an assignment occurred under the lease. Defendant's contention is that, when Cingular purchased all of ATTWS's outstanding stock, this constituted an assignment under the lease. The Lease clearly states that a transfer of at 25% of the ownership interest in the Tenant constitutes an assignment. However, it makes no mention of the effect of a transfer of the ownership interest in a parent of the tenant. While ATTWS may have had a controlling interest in the tenant or a parent of the tenant, it was never a tenant itself. As such, a change in ATTWS's ownership does not constitute an assignment as a matter of law. Moreover, even if such a transfer did constitute an assignment, it is not clear from the facts that ATTWS was a parent of CTC, the original tenant. Plaintiff's have only conceded that ATTWS was affiliated with LinBroadcasting LLC, which was the parent of LIN, which in turn controlled CTC. As such, defendant has not established that, as a matter of law, plaintiffs have failed to state a cause of action or that defendant has a complete defense to their action.

The cases defendant cites are readily distinguishable from the present case. In *Citizens Bank & Trust Co. v. Barlow Corp.* (295 Maryland 472, 456 A2d 1283, 1983), the corporate tenant itself merged into another corporation and ceased to exist and court found that constituted an assignment. In *White v. Huber Drug Co.*, (190 Mich 212, 157 NW 60, 1916), the corporate tenant transferred its rights under a lease to a new corporation and the court concluded that constituted an assignment. In *Parks v. CAI Wireless Systems, Inc.*, (85 F.Supp.2d 549 [D.C. Md. 2000]), a corporate member of a joint venture merged with another corporation and assigned its property interests thereto. In each of those cases, the court found an assignment based on a change of ownership in a corporate entity. Here, defendant alleges that an assignment occurred from a change of ownership in a corporate entity's parent. As such, those cases are not controlling on this matter.

The court notes that the papers appear to indicate that the tenant itself has changed identity and perhaps ownership at least twice. However, there is not enough information in the record to determine whether those transactions constitute assignments under the lease. Defendant limits its argument to the transaction between ATTWS and Cingular Wireless LLC. Since defendant has not clearly established that that transaction constituted an assignment as a matter of law, the court does not reach the second question of whether defendant was entitled to terminate the lease as a matter of law. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is denied, and it is further

ORDERED that defendant is instructed to serve its answer within twenty days of the date of this order, and it is further

ORDERED that all parties shall appear for a Preliminary Conference before the Court on Friday, August 26, 2005, at 9:30 a.m., in Room 581 at 111 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: April 13, 2005
New York, New York

ENTER:

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J.S.C.
JUN 20 2005
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