

Ahmed v 174 Second Equities Corp.

2006 NY Slip Op 30032(U)

November 9, 2006

Supreme Court, New York County

Docket Number: _300601/7942

Judge: Sherry Klein Heitler

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11-13-06

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

AHMED NAGI AHMED,
Plaintiff,

INDEX NO. 601794/06

- v -

MOTION DATE _____

174 SECOND EQUITIES CORP.,
Defendant.

MOTION SEQ. NO. 001

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is hereby:

ORDERED that the issue(s) of the amount of arrears owed to defendant 174 Second Equities Corp. by plaintiff Ahmed Nagi Ahmed is referred to a Special Referee to hear and report, with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this issue is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

This shall constitute the decision and order of the court.

Dated: 11-9-06

FILED
NOV 17 2006
Sherry Klein Heitler
HON. SHERRY KLEIN HEITLER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

¹Copies are available at the Motion Support Office at 60 Centre Street, and on the Court's website.

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

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

Sherry Klein

PRESENT: HEITLER
Justice

PART 30

Attm 02, A
- v -
174 SECOND EQUITIES CORP

INDEX NO. 601794/06
MOTION DATE _____
MOTION SEQ. NO. (01)
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

is decided in accordance with the memorandum decision dated 11-9-06.

FILED
NOV 13 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11-9-06

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-----X
AHMED NAGI AHMED,

Plaintiff,

-against-

174 SECOND EQUITIES CORP.,

Defendant.

SHERRY KLEIN HEITLER, J.:

Index № 601794/06

FILED

NOV 13 2006

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Ahmed Nagi Ahmed (Ahmed), as tenant, and defendant 174 Second Equities Corp. (Second Equities), as landlord, were parties to a five-year commercial lease (the Lease) which ran from May 1, 2001 through April 30, 2006 (the initial term). Ahmed operated a retail delicatessen store in the leased space (the premises) both prior to, and during, the initial term. Ahmed does not dispute that, despite the Lease's requirement for timely rent payments, he was frequently late with his payments, or that he failed to provide timely notification of his intent to renew the Lease on his retail store. Although Ahmed did, ultimately, provide written notification of his intent to renew, this did not occur until September 15, 2005, approximately 78 days late, and Second Equities has refused to acknowledge Ahmed's attempt to exercise his option to renew.

Following Ahmed's failure to vacate the leased premises on April 30, 2006, defendant commenced the holdover proceeding in Civil Court to recover possession. This, in turn, triggered Ahmed's instant motion, by order to show cause, for an order, pursuant to CPLR 6301, granting the removal of the summary holdover proceeding from housing court and consolidating

it with the instant Supreme Court action in which he seeks a judicial declaration that the Lease was renewed. In the alternative, Ahmed seeks an order staying the summary holdover proceeding pending resolution of the removal motion.

Defendant cross-moves for an order, pursuant to CPLR 3212, granting: (1) a summary dismissal of plaintiff's complaint; and (2) summary judgment in defendant's favor on its counterclaims for a declaration that a lease, which is at the center of this dispute, had expired; for a judgment of possession of the premises; and for rental arrears in the amount of \$37,847.31.

Ahmed does not dispute that he was in breach of certain provisions of the Lease, but contends that his breach was de minimis, and that by accepting his frequently late rent payments, the defendant waived its right to mandate strict adherence to the time requirements contained in the Lease. He also contends that Second Equities should be equitably estopped from recovering possession of the premises on the grounds that his tardiness was inadvertent, and because the harm he would suffer if defendant is awarded possession, outweighs any harm defendant might sustain if the Lease is renewed.

Second Equities strongly denies acquiescing to Ahmed's pattern of paying rent past its due date. Moreover, defendant asserts that, because Ahmed repeatedly breached the aspect of the Lease which made timely payment of monthly rent a prerequisite for the exercise of the Lease renewal option, he automatically forfeited his right to exercise the option, and the complaint should be dismissed.

Paragraph 80 of the Lease provides, in relevant part:

If Tenant shall keep, observe and perform all the terms, covenants, and conditions of this lease on the part of the Tenant to be kept, observed and performed hereunder and if this lease shall be in full force and effect, and if

Tenant has paid the rent and additional rent under lease on a timely basis before the 10th of each month during the 4 (four) years from the commencement date of the lease, then Tenant shall have the right to extend the original Five (5) year term of this lease (the "Initial Term") for an one [sic] additional successive period of Five (5) years (such period being hereinafter called the "Extension period"). The Extension period to commence immediately following the expiration of the initial term thereon. Tenant may exercise said right if applicable, to extend the Lease by giving notice to Owner within sixty (60) days after the end of the four (4) years from the commencement date of the Lease by giving notice to Owner Certified Mail, Return Receipt Requested.

Plaintiff's motion for removal of the Civil Court proceeding and joining it with the instant declaratory judgment action pending in Supreme Court (CPLR 3001), is both unopposed and granted, and accordingly, this court will address the balance of the motions.

"The primary purpose of declaratory judgments is to adjudicate the parties' rights before a 'wrong' actually occurs in the hope that later litigation will be unnecessary" (Klostermann v Cuomo, 61 NY2d 525, 538 [1984]). In his complaint, plaintiff seeks a declaration that the Lease was renewed. In its motion, defendant not only seeks a summary dismissal of the complaint, but, among other things, seeks summary judgment on its counterclaims for a judicial declaration that the Lease had expired, and for a judgment of possession of the premises.

It is well settled that "the drastic remedy of summary judgment is appropriate only where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. Moreover, the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion" (Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 [2nd Dept 1990] [internal quotation marks and citations omitted]). Accordingly, plaintiff contends that specific triable questions of fact exist which both mandate discovery and preclude summary judgment. He asserts that discovery would reveal

whether: (1) the renewal clause was a condition or a conditional limitation; (2) Second Equities could deprive Ahmed of a renewal lease after Ahmed provided notice of his intent to renew; (3) Second Equities was required to notify Ahmed of any material default before suspending the renewal option; (4) Second Equities was required to send plaintiff a bill, statement, or other notice that additional rent was owed; and (5) Second Equities is estopped from alleging non-compliance after repeatedly advising Ahmed that late rent payments would not affect his option to renew.

An examination of the Lease fails to reveal any ambiguity, or the need for discovery, as to any of the issues raised by plaintiff. It is well settled that “[a]n agreement of lease possesses no peculiar sanctity requiring the application of rules of construction different from those applicable to an ordinary contract” (Farrell Lines, Inc. v City of New York, 30 NY2d 76, 82 [1972] [internal quotation marks and citation omitted]). Ahmed and Second Equities’ intent is “determined from the language employed, and where the language is clear and unambiguous, interpretation is a matter of law to be determined solely by the court. In such circumstances resort cannot be had to extrinsic evidence to contradict the express term of the writing” (1009 Second Ave. Assocs. v New York City Off-Track Betting Corp., 248 AD2d 106, 107 [1st Dept 1998]). The subject Lease placed the responsibility on plaintiff to pay rent by the tenth of each month. It placed no obligation on Second Equities to send a bill, statement, or other notice with respect to rent owed. Nor did it obligate Second Equities to send any type of notification to Ahmed warning him that rent deadlines were crucial and that his failure to meet the deadlines stated in the Lease could cause him to forfeit his right to renew the Lease.

In fact, paragraph 79 specifically states, in relevant part:

The failure of Owner or Tenant to seek redress for violation of or to insist upon the strict performance of, any covenant or condition of this Lease, shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by Owner of rent with knowledge of the breach of any covenant of this Lease shall not be deemed a waiver of such breach. No provision of this Lease shall be deemed to have been waived by Owner or Tenant, unless such waiver is in writing signed by such party. No payment by Tenant or receipt by Owner of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction and Owner may accept such check or payment without prejudice to Owner's right to recover the balance of such rent or pursue any other remedy in this Lease provided.

* * *

(c) No earlier statement or prior written matter shall have any force or effect. Tenant agrees that it is not relying on any representations or agreements other than those contained in this Lease. This agreement shall not be modified or cancelled, except by writing subscribed by all the parties.

* * *

(k) Any modification to this lease must be made in writing signed by the Owner, in which the Owner states and agrees to the modification. Owner may accept any partial payment check with any conditional endorsement without prejudice to Owner's right to recover the balance remaining due, or to pursue any other remedy available under this lease.

By executing the Lease, Ahmed agreed to the language above, as well as to the terms of his rent payments. By his own account, Ahmed was late with most, if not all of his rent payments which he knew were due by the tenth of each month, even though he knew that payment of rent on a timely basis was a condition precedent to exercising the renewal option. By his own account, Ahmed always intended to renew his Lease but did not take the time to do so, in writing, and within the prescribed time. Plaintiff offers no explanation for his tardiness aside from his unconfirmed statements that Second Equities' agents told him that "if [he] was a little late with [his] rent payments not to worry about it, the technicalities in the lease clause were

merely for ‘the lawyers,’” or that the landlord or his agents told him not “to worry about the exercise of the option that [he] was late in mailing,” or that he was “a little confused about the date by which [he] had to renew the lease since it said ‘commencement of the lease’ and [he] was unsure of what it meant since the lease was signed one day but back-dated to a different date” (Plaintiff’s Affidavit in Opposition). Such assertions, in any event, are extrinsic evidence and are inadmissible to vary the terms of the contract (1009 Second Ave. Assocs. v New York City Off-Track Betting Corp., supra, 248 AD2d at 107).

Plaintiff’s remaining argument is that, in some cases where forfeiture of leased premises is sought against a breaching tenant, “an equitable interest is recognized and protected against forfeiture, where the tenant has in good faith made improvements of a substantial character intending to renew the lease, the landlord is not harmed by the delay in notice, and the tenant would sustain substantial loss if the lease were not renewed” (95 East Main St. Serv. Sta., Inc. v H & D All Type Auto Repair, Inc., 162 AD2d 440, 441 [2nd Dept 1990]). To this end, Ahmed contends that he has accumulated good will at the subject premises where he has operated his grocery/delicatessen for “many years,” and that to deny him the ability to renew the Lease causing forfeiture of his leasehold because of an honest and inadvertent mistake, would be unduly harsh.

However, in contrast to the cases cited in his papers, plaintiff presents no evidence that his persistent tardiness was not simply part of his pattern of disregarding the portions of the Lease which require timely rental payments. Furthermore, he presents no evidence that he made improvements to the premises of a substantial character. Second Equities does not deny that its determination not to renew the Lease might cause Ahmed to sustain a substantial loss. However,

it also cannot be said that a tenant's persistent failure to pay monthly rent within the prescribed period does not cause a landlord to sustain a loss. Given Ahmed's failure to demonstrate that his breaches were inadvertent, or that he made substantial improvements to the grocery/delicatessen, the court declines to interfere, in the name of equity, with the lease's forfeiture.

"The ultimate question is whether plaintiff has shown the existence of a triable fact issue. If the issue claimed to exist is not 'genuine, but feigned, and "'there is in truth nothing to be tried' summary judgment is properly granted" (Rubin v Irving Trust Co., 305 NY 288, 306 [1953]). Ahmed has neither demonstrated the existence of a triable fact issue, nor has he demonstrated his entitlement to an equitable interest which should be recognized and protected against forfeiture.

Accordingly, it is

ORDERED that the motion by Ahmed Nagi Ahmed for an order removing the summary holdover proceeding from civil court and consolidating it with the instant action for equitable relief is granted; and it is further

ORDERED that the cross motion by 174 Second Equities Corp. is granted to the extent that summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that defendant's counterclaim for a declaration that the Lease expired at the end of the initial term on April 30, 2006 is granted; and it is further

ORDERED that the portions of the cross motion which seek a judgment of possession of the premises and for rental arrears in the amount of \$37,847.31 is severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or

another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

This shall constitute the decision and order of the court.

DATED: November 9, 2006

FILED
 NOV 13 2006
 NEW YORK
 COUNTY CLERK'S OFFICE

Sherry Klein Heitler

 SHERRY KLEIN HEITLER
 J.S.C.

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