

Elegant Egg Cup, Inc. v COD, LLC
2006 NY Slip Op 30736(U)
November 20, 2006
Sup Ct, New York County
Docket Number: 111913/06
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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THE ELEGANT EGG CUP, INC., and
CHARLENE AKAWA individually,
Plaintiffs,

Index No. 11913/06
Mtn Seq. 002

-against-

COD, LLC

Defendant.

FILED

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WALTER B. TOLUB, J.:

NEW YORK
COUNTY CLERK'S OFFICE

By pre-answer motion, Defendant seeks dismissal of all of the causes of action asserted by Plaintiff Charlene Akawa and dismissal of Elegant Egg Cup's first and fifth causes of action.

Facts

The Defendant COD, LLC (COD) is the owner of a building located at 151 East 80th Street, New York, NY. The building is a twelve story residential multiple dwelling with ground floor commercial space. Plaintiff, Egg Cup, Inc. (Egg Cup) is the tenant of a store pursuant to a commercial lease (Lease). The Elegant Egg Cup store is a floral and antique gift shop operated by Ms. Akawa.

Ms. Akawa is also Egg Cup's president. Ms. Akawa is not a party to the Lease between Egg Cup and COD, but as president of the company she signed off on the Lease and more significantly, executed a guaranty of all the obligations of the Lease.

In the Complaint, Plaintiffs alleges for a first cause of action that Defendant failed to provide proper extermination services in residential and other commercial spaces in the

building, causing the infestation of Plaintiffs' store.

Plaintiffs claim that the infestation was so severe that the store had to be closed for an indeterminate period of time. For a fifth cause of action, Plaintiffs seek rescission of the Lease because the Defendant, by not dealing with the extermination problem, frustrated the purpose of the Lease. Defendant's pre-answer motion to dismiss is denied in all respects.

Discussion

Plaintiff, Ms. Akawa, Has Standing

Defendant argues that since Egg Cup, and not Ms. Akawa, is the sole signatory to the Lease, that she does not have standing to pursue claims against COD. However, whether a party has a sufficiently cognizable stake in the outcome of the action also affects justiciability. (Society of Plastics Indus. v. Suffolk, 77 NY2d 761 [1991]). Ms. Akawa is the guarantor for the rent. If Egg Cup defaults, that obligation will fall upon Ms. Akawa. This constitutes a concrete injury that is different from any injury to corporate tenant and different from what might be suffered by any other person or entity. (New York County Lawyers Ass'n v. Pitaki, 188 misc2d 776 [Sup. Ct. N.Y. Co. 2001]).

Inasmuch as all the assertions in the Complaint must be accepted as true in a motion to dismiss, the allegations that Egg Cup has suffered damages at the hands of COD and that the Lease is incapable of performance must be considered to and defeat the

pre-answer motion to dismiss Ms. Akawa. (CPLR §3211)

The First Cause of Action Properly States a Cause of Action

Plaintiffs alleges for a first cause of action that Defendant failed to provide proper extermination services in residential and other commercial spaces in the building, causing an infestation of Plaintiffs' store. Defendant argues that under Article 15 of the Lease, maintenance and repairs are the tenant's obligations and that if the tenant had a problem it should have put the landlord on notice per the Lease requirements.

A contract is deemed to include applicable principles of law, statutes and regulations. (Jefferson Ins. Co. Of NY v. Travelers Indem. Co., 92 NY2d 363 [1988]). Here, the provision of applicable law is §27-2018 of the New York City Administrative Code. This provision provides that the owner of a multiple dwelling shall maintain regular extermination procedures when the building is infested with insects, vermin or other rodents. Plaintiffs allege that the building, not just the store, were infested and that such infestation was the cause of the store's infestation. Since the allegations in the Complaint must be accepted as true, Defendant's motion to dismiss is denied.

The Fifth Cause of Action Properly States a Cause of Action

For a fifth cause of action, Plaintiffs seek rescission of the Lease because the Defendant, by not dealing with the extermination problem, frustrated the purpose of the Lease.

Failure of consideration, an inability to perform the contract after it is made, or a breach in the contract which substantially defeats the purpose thereof, are the grounds for rescission.

(Callanan v. Keeseville, Ausable Chasm & Lake Champlain RR Co., 199 NY 268 [1910]; Babylon Assoc. v. County of Suffolk, 101 AD2d 207 [1994])). Plaintiffs sufficiently allege a breach of the Lease, the infestation problem, and that the breach defeated the purpose of said lease, for the fifth cause of action to survive a motion to dismiss

Accordingly it is

ORDERED that Defendant's motion is denied in all respects.

Counsel for the parties are directed to appear at 11:00 a.m. in room 335 at 60 Centre Street on January 5, 2007 for a preliminary conference.

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

Dated: 11/20/06

FILED

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