30th Place Holdings, LLC v 474431 Assoc.

2007 NY Slip Op 30892(U)

April 19, 2007

Supreme Court, Queens County

Docket Number: 0013436/2006

Judge: Peter Joseph Kelly

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** Justice

IAS PART 16

30TH PLACE HOLDINGS, LLC, Plaintiff, - against - 474431 ASSOCIATES, Defendants.	INDEX NO. 13436/06 MOTION DATE DECEMBER 5, 2006 MOTION CAL. NO. 25

The following papers numbered 1 to 9 read on this motion by defendant 474431 Associates (Associates) to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), and each and every cause of action asserted therein, and for an award of costs and expenses, including reasonable attorneys' fees incurred in the defense of the action.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.........	1 - 4
Answering Affidavits - Exhibits..................	5 - 9

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action against defendant Associates, a partnership, seeking to recover money damages and impose a constructive trust on rent overpayments and security-deposit interest. Plaintiff further seeks to direct defendant Associates, as the alleged trustee of such constructive trust, to deliver the corpus to it. Plaintiff is the successor in interest to the rights of The Factory, L.P. (Factory), as tenant, under a net lease with defendant Associates, as landlord, of the premises known as 47-44 31st Street, Long Island City, New York. Plaintiff alleges that while the net lease set a fixed annual rent and required the payment of additional rent, section 2.07 of the net lease entitled it to a reduction in the fixed annual rent and the elimination of the obligation to pay additional rent by virtue of the happening of certain events. One of these events included an involuntary "transfer" of the partnership interest of one Alvin Schwartz, a partner of defendant Associates, upon Schwartz's death.

Plaintiff also alleges that it is the successor in interest to the

rights of Factory under a put agreement with Associates. The put agreement granted defendant Associates an option to require Factory, as tenant, to purchase the leased premises upon the happening of a "transfer." According to plaintiff, defendant Associates was allowed to exercise the option (the "put") when Alvin Schwartz ceased to hold a one-third partnership interest in Associates. Alvin Schwartz died on September 12, 2001, and his death allegedly caused a transfer under both the net lease and the put agreement. Defendant Associates exercised the put, and a closing of the sale of the premises, between defendant, as seller, and LIC Crown Fee Owner, LLC, as assignee of plaintiff, took place on May 31, 2006.

In its first cause of action for breach of contract, plaintiff alleges that pursuant to section 1(c) of the put agreement, it was entitled as of March 12, 2002 (as the "rent reduction date") and continuing in effect through October 31, 2005 (as the date of the tender of executed copies of the contract of sale), to a reduction in rent as provided for in section 2.07 of the net lease. Plaintiff further alleges that during such period, however, defendant Associates issued erroneous bills, which failed to take into account the self-executing rent reduction. Plaintiff allegedly paid the erroneous bills, and defendant Associates now refuses to repay plaintiff the $5,404,098.00 in rent overcharges, notwithstanding plaintiff’s demand.

As a second cause of action plaintiff alleges that under sections 36.01 and 36.02 of the net lease, defendant Associates was required to pay plaintiff the sum of $569,925.00, representing interest earned on the $2,000,000.00 security deposit, from March 12, 2002 to the date upon which defendant Associates returned the security deposit to plaintiff which was June 1, 2005. Defendant Associates, however, allegedly refused to pay over the interest earned thereon to plaintiff.

As a third cause of action plaintiff alleges that defendant Associates has been unjustly enriched by the failure of Associates to repay the rent overcharges to it, and to pay to plaintiff the accrued interest on the security deposit. As a fourth cause of action, plaintiff alleges that the rent overpayments and security-deposit interest form the corpus of a constructive trust, with defendant Associates as the trustee.

In lieu of serving an answer, defendant Associates moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). Defendant Associates asserts, among other things, that plaintiff’s claims are barred under section 23.01 and 23.02(a) of the net lease. In addition, defendant Associates asserts that plaintiff was not entitled to any rent reduction pursuant to section 2.07 of the net lease, because defendant Associates timely exercised the put. Plaintiff opposes the motion, arguing, among other things, that its claims are not barred by the net lease, the contract of sale expressly provided for a post-closing adjustment of fixed and additional rent, and it is entitled to recover the accrued interest on the security deposit pursuant to the net lease and put agreement.

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged in the complaint as true and determine whether those facts set forth state a cause of action (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; Morris v Morris, 306 AD2d 449, 451 [2003])" (Jorjill Holding Ltd. v Grieco Associates, Inc., 6 AD3d 500 [2004], lv to appeal denied 4 NY3d 703 [2005]). A dismissal may be warranted if affidavits or documentary evidence conclusively dispose of the plaintiff's claim as a matter of law (see Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d at 88).

"The fundamental precept of contract interpretation is that written agreements are construed in accordance with the parties' intent. A written agreement that is complete, clear, and unambiguous on its face must be enforced in accordance with the plain meaning of its terms (see Civil Serv. Empls. Assn. v Plainedge Union Free Sch. Dist., 12 AD3d 395, 396 [2004]; Lane v Seltzer, 303 AD2d 378, 379 [2003]; Hindes v Weisz, 303 AD2d 459, 460-461 [2003]). 'A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion"' (Computer Assoc. Intl. v U.S. Balloon Mfg. Co., Inc., 10 AD3d 699 [2004], quoting Breed v Insurance Co. of N. Am., 46 NY2d 351 [1978])," (Belle Harbor Washington Hotel, Inc. v Jefferson Omega Corp., 17 AD3d 612 [2005]).

Section 2.07 of the net lease provides for a reduction in the fixed rent and other rents upon the occurrence of a particular event, and establishes a date when the reduction in rent begins. The rent reduction date is defined in that section as the date "which is one hundred eighty (180) days after the date of any ... disposition by Alvin Schwartz of ... his partnership interest in ... [Associates] ... (including without limitation ... any transfer which is involuntary or which occurs by operation of law) such that Alvin Schwartz, personally and individually, ceases to hold one-third the partnership interest in [Associates] ...."

Section 23.01 of the net lease, in pertinent part, provides:

> "Subject to the provisions of this lease, [Associates] shall have the right to sell, convey or transfer its interest in the Premises .... The obligations of [Associates] under this lease shall not, except as expressly provided herein, be binding upon [Associates] ... after any such sale, conveyance or transfer ... of its interest in the Premises, and in the event of any such sale, conveyance or transfer [Associates] shall be and hereby is entirely freed and relieved of all existing and future covenants, obligations and liabilities of [Associates] hereunder, and it shall be

> deemed and construed without further agreement between the parties or their successors in interest or the purchaser, grantee or transferee of Landlord's interest, that such purchaser, grantee or transferee has assumed and agreed to carry out any and all existing and future covenants, obligations and liabilities of Landlord hereunder."

Section 36.02 of the net lease provides:

> "On the Rent Reduction Date, Landlord shall return the Security Deposit and all interest accrued thereon to Tenant and if same has not been delivered to Tenant within ten (10) days thereafter Tenant shall have the right, upon notice to Landlord, to set-off said sum against the next installments of Fixed Rent coming due hereunder. However, such right of set-off shall not limit the rights and remedies of Tenant to enforce Landlord's obligation to return the Security Deposit and all interest earned thereon on the Rent Reduction Date."

The plain reading of section 23.01 of the net lease does not allow for the interpretation proffered by plaintiff. It clearly and unambiguously provides that defendant Associates is relieved from all of its then existing and future liabilities under the net lease in the event of a sale, conveyance or transfer. There is no dispute that the sale took place, and, thus, defendant Associates is not liable to plaintiff for any rent overcharges accruing prior to the sale, or accrued interest on the security deposit. Although plaintiff argues that in the absence of an express agreement to the contrary a successor landlord does not assume any existing or accrued liabilities under a lease, such argument is irrelevant to the issue at bar. Defendant Associates is not the successor landlord, but the predecessor landlord, and the express and intended beneficiary of the release and exculpatory provision of section 23.01.

Moreover, even assuming section 23.01 did not act to relieve Associates from liability upon the sale of the premises, plaintiff has failed to assert a viable claim that it was entitled to any rent reduction for the period March 12, 2002 through October 31, 2005, or to interest accruing on the security deposit during that period.

Section 1 of the put agreement, in relevant part, provides that:

> "(a) [Plaintiff] hereby grants Associates the option to require [plaintiff] to purchase

the Premises (the "Put") for the sum of ... $35,100,000.00 ... on the terms and conditions set forth herein .... Associates shall have the right to exercise the Put by giving notice to [plaintiff] on a date (herein called the "Put Date") which is not sooner than the date of any ... transfer ... of all ... of [Alvin Schwartz's] partnership interest in Associates ... and not later than the date which is one hundred and eighty (180) days after the date of any such Transfer (said period is hereinafter referred to as the "Exercise Period"). Associates agrees to give [plaintiff] prompt notice of the occurrence of any Transfer. Notwithstanding the foregoing, [plaintiff] agrees to give Associates notice of the impending expiration of the Exercise Period not more than forty-five (45) days and not less than fifteen (15) days prior thereto, and in the event [plaintiff] fails to give Associates such notice the Exercise Period shall not expire on the date hereinabove described and, in such event Associates shall have an additional period in which to exercise the Put, which additional period shall expire fifteen (15) days after the receipt by Associates of the above-described notice from [plaintiff]. Simultaneously with giving notice of the exercise of the Put, Associates shall execute and deliver to [plaintiff] ... two (2) copies of the contract of sale in the form annexed ... and made part hereof ("Contract of Sale"). Upon receipt of such notice together with the Contract of Sale, [plaintiff] ... shall date and execute such Contract of Sale within ten (10) business days thereafter and shall deliver an original counterpart thereof to Associates ....

(c) In the event that Associates timely exercises the Put within the Exercise Period provided in subparagraph (a) above, including the notice periods set forth therein, then Section 2.07 of [the] net lease ... shall not apply, unless [Landlord] shall fail or be unable to deliver title in accordance with the Contract of Sale. In the event Associates shall fail or be unable to deliver title ..., then Section 2.07 shall again apply from and after such failure or inability to deliver title."

By letter dated February 26, 2002, defendant Associates notified plaintiff that a transfer had occurred on September 12, 2001. Defendant Associates did not, by means of that letter, simultaneously exercise the put. In fact, plaintiff indicated, by letter dated October 17, 2005, that it had never received a written notice from defendant Associates exercising the put, and that it was first informed of Associates's intention to exercise the put during the course of a telephone conversation, apparently held between counsel for the parties. By letter dated October 31, 2005, defendant Associates exercised the put, and tendered two executed counterparts of the contract of sale in the form annexed as "Schedule B" to the put agreement.

Plaintiff makes no claim that it ever gave notice to Associates of the expiration, (impending or otherwise), of the exercise period for the put, or the occurrence of the rent reduction date. Instead, plaintiff first mentioned the alleged overbilling for fixed rent arising after the "rent reduction date," and claimed Associates had been required to return the security deposit with accrued interest, when plaintiff returned the executed contract of sale to defendant Associates on November 11, 2005.

With respect to the issue of the interest on the security deposit, Factory and defendant Associates entered into a letter agreement dated October 1, 1994, modifying section 2.05 of the net lease so that interest earned on the security deposit would be accepted by defendant Associates as the additional rent required to be paid under section 2.05 of the net lease. Plaintiff makes no mention of this modification.

Under these circumstances, plaintiff has failed to state a cause of action against defendant Associates for breach of contract. As an aside, it would also appear that if defendant Associates was required to repay plaintiff for all accrued interest on the security deposit, plaintiff would then owe defendant Associates the additional rent required by section 2.05.

The causes of action for unjust enrichment and constructive trust claims are duplicative of plaintiff's claims for breach of contract. In addition, plaintiff's third cause of action for unjust enrichment must be dismissed insofar as the parties had a valid lease governing their relationship (see Clark-Fitzpatrick, Inc. v Long Island R. Co., 70 NY2d 382 [1987]). Furthermore, a plaintiff may not assert a cause of action for unjust enrichment to recover amounts it claims to have overpaid under a lease (see TAG 380, LLC v Ronson, 8 Misc 3d 1027(A) [2005] [dismissing unjust enrichment claim for payment of excessive rent]).

Accordingly, the branch of the motion seeking to dismiss the complaint is granted.

That branch of the motion seeking an award of reasonable attorneys' fees is denied. Defendant Associates has not served an answer with a counterclaim for such relief, or established that the litigation was frivolous pursuant to 22 NYCRR § 130-1.1.

Dated: APRIL 19, 2007

____
Peter J. Kelly, J.S.C.