

American Real Estate Holdings, Ltd. v Citibank, N.A.
2007 NY Slip Op 31355(U)
May 17, 2007
Supreme Court, New York County
Docket Number: 0111759/2006
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

American Real Estate Holdings, Limited
Partnership,
Plaintiff,

Index No.: 111759/06

Motion Date: 05/15/07

Motion Seq. No.: 001

- v -

Citibank, N.A., and Citigroup, Inc.,
Defendants.

Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion to dismiss the Complaint and for sanctions and this cross-motion to amend the Complaint _____

FILED

PAPERS NUMBERED

Notice of Motion/-Affidavits -Exhibits _____

1

Answering Affidavits - Exhibits _____

2

Replying Affidavits - Exhibits _____

3

MAY 29 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss the Complaint and for sanctions is DENIED and that this cross-motion by plaintiff to amend the Complaint is GRANTED.

By Decision and Order dated November 11, 2005 in Lighthouse 925 Hempstead LLC v Citibank, N.A. (Supreme Court New York County Index No. 105379/05), the court (Beeler, J.) held that at the time of the Assignment and Assumption Agreement dated October 27, 2004, plaintiff, the seller of the Premises, had no "rights, title and interest" under the Lease, which is the subject of the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

[* 2]

action at bar ("the Lease") to assign to Lighthouse. The court reasoned that since the Assignment and Assumption Agreement pertained only to "rights, title and interest...accruing on and after the date" of the Closing, the Lease, which had expired prior to the Closing, could not have been and was not assigned under that Agreement. However, the plaintiff at bar was not a party in Lighthouse v Citibank, supra, and the Order dated November 11, 2005 said nothing about its rights under the Lease.

Under the Assignment and Assumption Agreement, plaintiff (the seller-assignor) agreed to hold Lighthouse (the buyer-assignee) harmless from and against any of the landlord's obligations under the Lease accruing prior to the Closing. Reciprocally, under that Agreement, Lighthouse (the buyer-assignee) agreed to hold plaintiff (the seller-assignor) harmless from and against any of the landlord's obligations under the Lease after the Closing. The failure of the Assignment and Assumption Agreement to assign any Lease and the lack of any landlord obligations under the Lease for Lighthouse to indemnify are consistent with the Order dated November 11, 2005 that found a lack of privity between Lighthouse, the buyer-assignee, and defendant. The failure of the Assignment to assign anything and plaintiff's obligation to indemnify Lighthouse (the buyer and its assignee) for any obligations under the Lease arising prior to the Closing is also absolutely consistent with plaintiff's

[* 3]
reservation, by its omission from the assignment, of any claim of breach of Lease accruing against defendant prior to the Closing.

Analogous to the action at bar is City of New York v. Farrell Lines, Inc., 30 NY2d 76 (1972). In Farrell Lines, the Court of Appeals held that a Landlord is entitled to recover for damages for a breach of its lessee's covenant to keep premises in good repair, notwithstanding that subsequent to the termination of the Lease, the Landlord entered into a contract for demolition of the subject premises. Here, rather than demolition, defendant sold the subject Premises. The Court of Appeals in Farrell Lines held that the measure of damages is the cost to put the premises in the required state of repair. Here, plaintiff alleges that defendant Citibank, NA, breached its obligation to return the Premises in good repair prior to its surrender of the Premises at the expiration of the Lease. Plaintiff's Complaint therefore alleges a cause of action cognizable in law. See also City of New York v Pennsylvania Railroad Company, 37 NY2d 298, 301 (1975) ("An action for the breach of a tenant's covenant to keep the premises in repair may be brought either before or after the expiration of the term.")

The court concurs that plaintiff may amend its Complaint without leave of court at any time before the period for responding to it expires. CPLR § 3025(a).

[* 4]

Finally, the Conditional Approval #476 of August 2001 of the Comptroller of the Currency appended to defendants' motion does not constitute irrefutable documentary evidence that would entitle defendant Citigroup to dismissal of the Complaint against it pursuant to CPLR 3211(a)(1).

Accordingly, it is

ORDERED that the motion to dismiss the Complaint and to impose sanctions is DENIED; and it is further

ORDERED the cross-motion to amend the Complaint is GRANTED; and it is further

ORDERED that defendants shall serve and file their responsive pleadings pursuant to CPLR 3211(f); and it is further

ORDERED that the parties shall appear for a preliminary conference in IAS Part 59, 111 Centre Street, Room 1254 on July 10, 2007, 9:30 AM.

This is the decision and order of the court.

Dated: May 17, 2007

ENTER:

~~W. J. ...~~
J.S.C.

FILED
MAY 29 2007
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