

Grand Deli, LLC v Seward Park Hous., Inc.

2007 NY Slip Op 31627(U)

June 6, 2007

Supreme Court, New York County

Docket Number: 0602960/2006

Judge: Judith J. Gische

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.

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 24

GRAND DELIS LLC

INDEX NO.

602960/06

MOTION DATE

SEWANA PARK

MOTION SEQ. NO.

1

HOUSING CORP.

MOTION CAL. NO.

consolidate
X motion dismissed 6/32/11

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

PC scheduled 7/5/07 @ 9:30 am

FILED

JUN 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 6 2007

JJG
HON. JUDITH J. GISCHE *s.c.*

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

REPLY/AMENDMENT/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

Grand Deli, LLC,
Plaintiff

-against-

Seward Park Housing, Inc.
Defendants.

DECISION/ORDER

Index No.: 602960/06

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

FILED

JUN 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Papers	Numbered
Grand Deli OSC (prelim injunction) w/IRF affirm, NS affid, exhs .	1
SPHC x/motion (3211) w/SSA affirm, exhs (sep back)	2, 3
IRF affirm in opp to x/motion, exhs	4
Amended Verif Comp	5
SPHC reply w/SSA affirm, exh	6

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Plaintiff Grand Deli LLC's ("Grand Deli") has brought an motion seeking a stay of a commercial nonpayment proceeding the defendant has commenced against it in the Civil Court and an order removing that proceeding to this court. Hon. Rosalyn Richter, the judge presiding over this case when the OSC was presented, struck the interim relief sought by plaintiff.

Simultaneously with bringing this order to show cause, plaintiff served its verified summons and complaint seeking a declaratory judgment as to the amount of real estate

taxes it owes and for the reformation of its lease with the defendant. Defendants has not answered the complaint, but seeks its dismissal before issue has been joined.

Before the motions were argued and submitted for the court's decision, plaintiff amended its complaint. Since both sides have addressed the merits of the amended complaint, the court has before it a complete files for its decision which immediately follows.

To the extent that defendant, in the alternative, urges the court to convert its motion to dismiss to summary judgment on notice [CPLR § 3212 (c)], that motion is denied because there is no compelling reason presented for the court to rule on a summary basis before issue has been joined. CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 (1st dept. 1982).

Background

Grand Deli owns and operates a Kosher deli at 399-401 Grand Street, in a building owned by defendant Seward Park Housing Corp. ("Seward Park"). Grand Deli has a lease for the store housing the deli. The lease was made in April 2002, commencing May 1, 2002 and ending October 31, 2007, with an option to renew ("the lease").

Since each motion concerns markedly different aspects of this case, the standard of law applicable to each motion is also very different. Defendant's motion attacks the legal sufficiency of the amended complaint. CPLR § 3211 (a) (7). On a motion to dismiss, the facts as alleged by the plaintiff are accepted as true, and afforded the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs

& Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted by moving parties in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]).

Plaintiff's motion, on the other hand, is for an order removing the holdover proceeding to Supreme Court because the Civil Court is a court of limited jurisdiction and much of the relief sought in that proceeding mirrors the dispute between the parties in this case. CPLR § 602 [a]; Bradford v. John A. Coleman Catholic High School, 110 AD2d 965 (3rd dept. 1985). Although consolidation is discretionary, it is warranted unless the defendant can show some prejudice to a "substantial right." Maiqur v. Saratogian, 47 AD2d 982 (3rd dept. 1975).

With this analytical framework in mind, the court first considers defendant's motion to dismiss, accepting the following factual claims as true for the purposes of this motion:

Facts Considered

Although the printed portions of the lease and rider between Grand Deli and Seward Park identify the "demised premises" as 399-401 Street, the building wherein Grand Deli has its store, the parties' dispute is over paragraph 50 of the lease rider which pertains to real estate tax escalations and the apportionment of Grand Deli's share of such escalations. Plaintiff contends that paragraph 50 of the lease should be reformed or rescinded on the bases of a mutual mistake, fraudulent misrepresentation,

unconscionability and/or equitable estoppel.

Grand Deli admits that its principal signed the lease and that it calls for plaintiff to pay its apportioned share of real estate tax escalations. It also agrees that applicable base tax year is that of July 1, 2002 - June 30, 2003. Plaintiff acknowledges that the lease calls for its to pay escalations equal to 6%. Plaintiff contends, however, that it was led to believe that this percentage was on the *building* or commercial strip where the demised premises (e.g. its store), is located. Defendant, however, argues that the express terms of the lease require plaintiff to pay 6% of the annual real estate taxes for all *property* which, by definition, consists of "Block 311 Lot 13."

The difference between what plaintiff contends it believed it had to pay (e.g. the lease it thought it was signing) and what the lease actually provides is staggering because "the property" (e.g. Block 311 Lot 13) consists of thousands of residential apartments and dozens of commercial stores scattered throughout five (5) separate high rise buildings in a massive complex on the Lower East Side of Manhattan. Each of the five buildings is not separately lotted but cumulatively form "Lot 13."

Insofar as relevant to these motion, paragraph 50 of the lease rider provides as follows:

"50. Real Estate Tax Escalation:

- A. Tenant shall pay to the Landlord real estate tax escalations in accordance with this Article. As used in this Article, the following definitions shall apply:

[* * *]¹

¹ "[* * *]" indicates that further language in the section has not been reprinted by the court because it is not necessary for the purposes of the issues in dispute.

3. The term "Property" shall mean all of the land together with the improvements thereon, located on Block 311, Lot 13, as such Block and Lot appear on the Tax Map of the Borough of Manhattan and on the books and records of the New York City Tax Department [* * *]
4. The term "Comparative Year" shall mean the respective twelve (12) months following the Base Tax Year, and each subsequent period of twelve (12) months.
5. The term "Real Estate Taxes" shall mean the total of all real property taxes and special or other assessments and/or vault charges levied, assessed or imposed at any time by any governmental authority or against the Property [* * *]

Plaintiff contends that in the first year of its lease with the defendant, the defendant sent it a bill for tax escalations of \$2,300 for the period July 1, 2003 - June 30, 2004. Later, however, in December 2005, defendant sent the deli a bill for real estate tax escalations in the amount of \$33,771 for the period July 1, 2004 - June 30, 2005 and \$40,628.57 for the period July 1, 2005 - June 30, 2006. After Grand Deli objected to the bills and demanded the supporting statements to see how the escalations were calculated, Seward Park recalculated the bill because it noticed a mistake. After correcting this error, the escalations it sought from Grand Deli were reduced to \$22,339.54 (2004/2005) and \$17,944.87 (2005/2006).

It was at that point that plaintiff realized that it was being billed for escalations based upon *all* the buildings, etc. located within "Block 311 Lot 13" and that the lot did not consist of just the building where it maintains its business or the commercial strip where the store is located, but all of these following buildings:

52 Essex Street
357-411 Grand Street
175-187 Clinton Street
193-197 Clinton Street
196-218 East Broadway

Plaintiff uses the following formula as a visual aid of how it thought the escalations would be calculated versus how defendant is calculating them:

$$\frac{\text{Square footage of Grand Deli's restaurant}}{\text{Square footage of 399-401 Grand Street}} = \text{X\% (plaintiff's understanding)}$$

$$\frac{\text{Square footage of Grand Deli's restaurant}}{\text{Square footage of block 311 lot 13}} = \text{X\% (defendant's position)}$$

The defendants commenced the nonpayment action [Seward Park Housing Corp. v. Grand Deli, LLC., et al., Civil Court, New York County, L&T No. 68275/06] that plaintiff seeks to have removed to Supreme Court. Each party has moved for summary judgment in that case. Judge Padilla has severed Grand Deli's counterclaim for reformation/rescission of the lease because "this relief can only be sought in Supreme Court." Decision, Padilla J., 8/3/06. He has, however, ordered a trial on Seward Park's claim that Grand Deli has not paid the escalations that are due. In his decision he indicates that at trial Seward Park "will have to establish how the amount sought was calculated."

Grand Deli relies upon the affidavits of a number of persons who claim to be familiar either with the lease negotiations or the provision in dispute. Among the affidavits is that of Grand Deli's attorney who represented the store in connection with the lease negotiations, Mr. Bank, a prior co-owner of the deli, and other business owners who presently lease space in the so-called "commercial strip" in the housing complex. Mr. Ben-Yosef, one of these store owners, states that his own lease has the same provision and that he too was misled into thinking the block and lot consisted of

just the building where his store is. Mr. Bank affirms that he had a number of discussions with the then president of Seward Park about the escalations and he had no reason to believe that the "property" or "block and lot" meant anything more than the building or strip where the store is located. He also states that defendant was eager to have him open a Glatt Kosher deli to serve the community which is why they offered him (what he believed) was a very attractive lease package. He notes that the rent for the store is \$3,500 a month and that he never expected to pay tens of thousands more a year in tax escalations.

Based upon these factual allegations, Grand Deli has asserted 6 causes of action ("COA"). They are as follows: 1st COA- declaratory judgment about the proper amount of tax escalations they have to pay, 2nd COA- mutual mistake on the basis that the parties' oral agreement was not properly reduced to writing, 3rd COA- fraudulent misrepresentation based upon the intentional misrepresentation of a material fact, 4th COA- unconscionability of the lease at the time of its making, 5th COA- equitable estoppel/ detrimental reliance based upon its lack of knowledge of the true facts, that the property described consisted of more than just one building, and 6th COA- garage charges that are not part of their lease.

Seward Park contends that the clause is clear, no one misled the plaintiff, or forced the deli's principal to sign it, and that if there was any "mistake" it was by Grand Deli's lawyer who failed to perform a block and lot search. Seward Park admits that it is a massive complex, first established in the 1960's and argues that basic research would have revealed that the block and lot identified in the lease rider consists of 12 acres of land whereupon lie 5 residential high rise buildings with thousands of apartments, in

addition to dozens of stores along Grand and East Broadway. Thus, it is defendant's contention that plaintiff should have checked to see what "property" the rider meant, and that it had no obligation to tell plaintiff that Block 311 Lot 13 was not just one building, or area. Seward Park contends that, as a matter of law, none of the causes of action the deli has set forth are viable and each one should be dismissed. Defendant claims that Grand Deli was responsible for understanding the lease before it signed it and that even if the lease is onerous, the equities lie in favor of the landlord.

Defendants denies any misrepresentations were made, or that plaintiff was tricked into signed the lease, but did so of its own free will.

Discussion

In deciding whether the complaint survives this pleading stage motion, or must be dismissed, the court is not required to decide whether plaintiff has pled claims that it will eventually succeed on. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). Consequently, unless disproved through, for example, documentary evidence [CPLR 3211 (a)(5)], or the complaint fails to set forth a cognizable cause of action [CPLR 3211 (a)(7)], the complaint should be preserved until issue has been joined and the claims are ready for a dispositive motion or trial.

Applying this standard, plaintiff asserts facts which when accepted as true support the causes of action it has asserted against the defendant, thereby defeating Seward Park's cross motion to dismiss the complaint (or any cause of action therein) before issue has been joined. Rovello v. Orofino Realty Co., 40 NY2d 633, 634 (1976);

Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown & Wood, 243 AD2d 395 [1st dept. 1997]). In reaching this decision, the has also (as it has the right to do) considered the affidavits plaintiff has offered and other documents it has submitted to remedy any defects in its pleadings and more fully flesh out its claims. Leon v Martinez, 84 NY2d 83, 88 (1994).

Although, as defendant correctly argues, a lease is subject to the ordinary rules of construction, like any other agreement, and it is read to mean what it plainly states [George Backer Management Corp. v. Acme, 46 NY2d 211 (1978)], Grand Deli has set forth facts that would tend to support each of the claims, albeit imperfectly, set forth in the complaint. In reaching this determination, the court considers that “the essential purpose of a ‘tax escalation’ clause in a commercial landlord-tenant lease is to pass on to the tenant [its] proportionate share of increases in real estate taxes . . .” Credit Exchange, Inc. v. 461 Eighth Ave. Associates, 69 N.Y.2d 994 (1987). Such a clause is not, under ordinary circumstances, intended to impose upon the tenant additional responsibility for improvements that solely benefit the landlord, unless there is a provision to that effect. For example: Credit Exchange, Inc. v. 461 Eighth Ave. Associates, *supra*. Based upon plaintiff’s allegations, defendant is not only recovering from Grand Deli its proportional share of tax escalations, but by having similar provisions in other commercial leases, recovering these escalations over and over again.

Plaintiff’s allegations, that the escalation payments are so out of sync with plaintiff’s monthly rent of \$3,500, that no one in “their right mind” would agree to pay tens of thousands of dollars each year in escalations for a local deli restaurant supports

its cause of action based for the reformation or rescission based upon an unconscionability. Adelphia Lamps & Shades, Inc. v. 41 Madison Ave. Co., 70 A.D.2d 832 (1st Dept 1979). These facts also support plaintiff's cause of action based upon "mistake" - either mutual [Brauer v. Central Trust Co., 77 AD2d 239 (4th Dept 1980)] or unilateral [Chimart Assocs v. Paul, 66 NY2d 570 (1980)]. According to plaintiff, it believed it was getting a preferential rent and preferential terms. It believed tax escalations of 6% were preferential, and therefore a "good deal" for this property when coupled with its relatively modest rent of \$3,500 a month. Other than the bare language in the rider which bases the escalations on "the property," there is no indication in the printed lease or the rider of how "the demised premises" differs from "the property." Thus, plaintiff's belief that these terms were synonymous would support a cause of action for mistake on the basis that the subsequent writing (the lease) does not express the parties' intended agreement. Greater New York Mutual Insurance Company v. United States Underwriters Insurance Company, 36 AD3d 441 (1st Dept 2007).

Plaintiff's former owner's affidavit and that of its real estate lawyer both state facts which tend to support a claim for fraudulent misrepresentation. Both contend that the language "the property" and "Block 311 Lot 13" was put into the rider without any attention and that during negotiations plaintiff was either lead to believe that these terms had no special or unique or different meaning than "demised property." The elements of a "fraudulent misrepresentation" cause of action are: (1) the material misrepresentation of a material fact by defendant; (2) scienter that such misrepresentation is false; (3) justifiable reliance by the plaintiff on such

misrepresentation; and (4) injury or damages to the plaintiff. NYU v. Continental Insurance Co., 87 NY2d 308 (1995); P. Chimento Co. v. Banco Popular, 208 AD2d 385, 386 (1st dept. 1994). Thus, affording plaintiff the greatest latitude, it has set forth facts to support a fraud action based upon its claim that certain statements that were made by defendant during the course of its lease negotiations were untrue. Alternatively, plaintiff also has pled facts that tending to show that defendant only made a partial disclosure of the true facts, or actively concealed important facts. Partial or nondisclosure of material facts may be fraud. See: Junius Const. Co. v. Cohen, 257 NY 393 (1931); Jablonkski v. Rapalje, 14 AD3d 484 (2nd dept 2005). Since this was a lease agreement, and not contract of sale for the purchase of real property, the question of how far Grand Deli had to go to ascertain the makeup of "the property" and "Block 311 Lot 13" remains to be decided after issue has been joined.

Plaintiff has also set forth facts that support a cause for equitable estoppel. Grand Deli states that it lacked of knowledge of the true facts; it relied upon statements by the then president of Seward Park (Mr. West), and it had no reason to think (or suspect) that paragraph 50 sought payment of tax escalations on anything other than the building or strip where its store is located. Sardanis v. Sumitomo Corp., 282 A.D.2d 322 (1st Dept. 2001).

The separate, but overarching, causes of action for reformation and rescission withstand this pleading stage motion because Grand Deli has set forth facts, taken as a whole, that tend to support its claim that it expected to pay - and does not seek to avoid paying - its apportioned share of taxes on the square footage of 399-401 Grand Street, and that it believed "property" and "Block 311 Lot 313" as defined in the lease rider to

be no broader than the building or commercial strip its store is located within.

Since the complaint withstands dismissal, and defendant's cross motion to dismiss is denied, defendant's time to serve its answer is extended to no later than ten (10) days after being served with a copy of this decision/order with Notice of Entry.

After reviewing the petition, the answer, and Judge Padilla's decision in the nonpayment action [L&T No. 68275/06] it is apparent that not only would judicial economy be served by removing and consolidating the nonpayment proceeding here, plaintiff cannot obtain full relief in Civil Court. Therefore, plaintiff's motion, to have the nonpayment action removed and consolidated with this action is hereby granted.

Upon service of a copy of this order upon the Clerk of the Civil Court - County of New York: Commercial Nonpayment Part shall transfer the complete file in the petition of Seward Park Housing Corp. v. Grand Deli, LLC., et al., Index No. 68275/06 to the Supreme Court, New York County. Further, the Clerk of the Supreme Court, New York County, upon receiving such file shall place that file with this case and consolidate both actions, for all purposes, including discovery and joint trial.

Finally, the court hereby schedules the **Preliminary Conference In this case for July 5, 2007 at 9:30 a.m. in Part 10, 80 Centre Street** at which time a discovery schedule will be set.

Conclusion

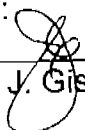
Defendant's cross motion to dismiss the complaint prior to issue being joined is denied in all respects. Plaintiff's cross motion for the removal and consolidation of the Civil Court action to this court is granted. A preliminary conference is also hereby scheduled for **July 5, 2007 at 9:30 a.m. in Part 10.**

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
June 6, 2007

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
JUN 14 2007
NEW YORK
COUNTY CLERK'S OFFICE