

Suntech II Intl., Inc. v GS Site 25 Retail, LLC
2007 NY Slip Op 31852(U)
June 19, 2007
Supreme Court, New York County
Docket Number: 0600424/2007
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHÉ
Justice

PART 10

Suntech II

INDEX NO.

600424/07

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

GS file 25

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

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

FILED
JUN 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JUN 19 2007

JUN 19 2007

HON. JUDITH J. GISCHÉ J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

THIS MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

-----X
Suntech II International, Inc.,

Plaintiff

-against-

GS Site 25 Retail, LLC,

Defendants.

DECISION/ORDER

Index No.: 600424/07

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

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

Papers

Pitff OSC w/WH affid, ARP affirm, exhs 1
Def x/motion to dismiss w/JL affirm, exhs 2
AP affirm in opp 3
JSL affirm in reply and further support 4

FILED Numbered

JUN 27 2007

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

GISCHE, J.

The within action is by plaintiff Suntech II International, Inc., the tenant of defendant GS Site 25 Retail, LLC, its landlord. Plaintiff has brought a motion seeking, in part, a preliminary or "Yellowstone" type injunction, tolling its time to cure the lease violation (nonpayment of rent) set forth in the December 18, 2006 Notice to Cure the landlord served, even though at the time the motion was made the landlord had already terminated the lease. The landlord has cross moved to dismiss the complaint for failure to state a cause of action. Plaintiff then withdrew its motion in chief, leaving only the

cross motion before the court for consideration.

Discussion

Plaintiff has asserted only two causes of action. The first is for breach of contract. Plaintiff alleges that it spent over \$1 million on renovations and decorations to the subject premises, but the landlord has been sending "notices to cure certain items which are either defective or not within the purview of the relationship of Plaintiff and defendant . . ." Plaintiff further alleges that this is an effort to destroy its business.

The second cause of action is for a permanent injunction against the landlord terminating its lease because the underlying Notice to Cure is defective.

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]).

In deciding whether the 1st cause of action survives this pleading stage motion by the defendants, 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.

The first cause of action is based upon factual claims that the two notices to cure serving as a predicate basis for the termination are not only defective, but pretextual. Plaintiff contends that now that the premises are completely renovated, the landlord wants to recover the premises and re-rent them for far more rent than the current lease is for. Plaintiff denies it had any rent arrears. It contends that the landlord's actions were taken in "bad faith." For example: Cemco Restaurants, Inc. v. Ten Park Ave. Tenants Corp., 135 A.D.2d 461 (1st Dept. 1987). Whether Suntech can ultimately prove that the notices were sent in bad faith is not for the court to decide at this time, but remains for decision at trial or on a dispositive motion after issue has been joined. Adams Drug Co., Inc. v. Knobel, 172 A.D.2d 470 (1st Dept., 1991). Tenant cannot obtain full relief in Civil Court on its breach of contract claim which seeks monetary damages. Therefore, defendant's cross motion, to dismiss the 1st cause of action is denied and defendant's time to answer the complaint is extended to fifteen (15) days from the of this decision /order.

The second cause of action for an injunction, however, is dismissed. The injunction sought is to prevent the defendant landlord from terminating the lease and presumably commencing a Civil Court summary proceeding. This injunctive relief is unnecessary since all of the claims made herein, including that the notices are

defective and/or that rent has been accepted, can be fully heard and decided as defenses to any eviction proceeding.

Conclusion

Plaintiff has withdrawn its motion for injunctive relief. Defendant's cross motion to dismiss is granted in part and the 2nd cause of action is hereby severed and dismissed without prejudice to raising the claims and allegations therein in the Civil Court. Defendant's cross motion as to the 1st cause of action is, however, denied and defendant's time to answer the complaint is hereby extended.

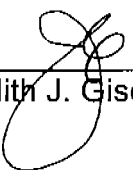
The court hereby schedules the preliminary conference In this case for July 26, 2007 at 9:30 a.m. In Part 10, Room 122.

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 19, 2007

So Ordered:



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

FILED
JUN 27 2007
NEW YORK
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