

<b>Hooters of Manhattan, Ltd. v 211 W. 56 Assoc.</b>
2007 NY Slip Op 32044(U)
July 6, 2007
Supreme Court, New York County
Docket Number: 0601529/2004
Judge: Karla Moskowitz
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

FBEM

-----X  
HOOTERS OF MANHATTAN, LTD.,

Plaintiff,

-against-

211 WEST 56 ASSOCIATES,  
-----X  
Defendant.

INDEX NO. 601529/2004 E

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered

1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**FILED**

JUL 11 2007


NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying  
Decision and Order.

Dated: July 6<sup>th</sup>, 2007

  
\_\_\_\_\_  
KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
HOOTERS OF MANHATTAN, LTD.,

Plaintiff,

Index No. 601529/2004 E

-against-

211 WEST 56 ASSOCIATES,

Defendant.

**DECISION and ORDER**

**FILED**

JUL 11 2007

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**Karla Moskowitz, J.:**

The court consolidates for disposition motion sequence numbers 003 and 004.

Plaintiff, Hooters of Manhattan, Ltd., sues for breach of contract and negligence arising from repair work done at 211 West 56<sup>th</sup> Street in New York City, a portion of which plaintiff leased from defendant 211 West 56 Associates. In motion sequence 003, defendant moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In motion sequence 004, plaintiff also moves, pursuant to CPLR 3212, for summary judgment on its claims and dismissal of defendant's counterclaims. For the reasons stated below, the court grants the motions in part and denies them in part.

**1. Background**

Defendant is the owner and landlord of the 211 West 56<sup>th</sup> Street building. The building is a multiple dwelling with commercial space on the lower floors.

On March 28, 1997, defendant leased the first and second floors of the building to non-party Manhattan Wings, Inc. Sometime thereafter, Manhattan Wings filed for bankruptcy. The Bankruptcy Court eventually approved assignment of the lease to plaintiff. Plaintiff operates restaurants under the trade name "Hooters." Plaintiff and defendant memorialized the lease assignment in an addendum dated May 22, 2000. The addendum stated that all provisions of the

underlying lease remained in full effect.

The lease provided for plaintiff to operate a restaurant on the first two floors, as well as use an outdoor plaza, adjacent to the first floor of the building. Plaintiff states that it made \$153,894.94 worth of improvements to the plaza between August of 2000 and October of 2001, including lighting, landscaping and furniture.

The work at issue in this action arises from defendant's efforts to comply with New York City Local Law 11, known as the Building Facade Law. According to plaintiff, at some point, defendant hired an engineer to inspect the building facade. On January 17, 2002, defendant's engineer, Alan Epstein, P.E., allegedly advised defendant that the building required immediate repairs to its exterior because of unsafe conditions that posed a threat to the public.

In March of 2002, defendant had a scaffold and sidewalk shed erected around the perimeter of the building. Plaintiff states that the scaffolding completely covered the Hooters' distinctive orange awning and blocked the public's view of televisions inside the restaurant that people had previously been able to see from the street. Plaintiff asserts that these items had served to attract customers to the restaurant. Plaintiff also asserts that defendant began using the plaza as a construction staging area and debris field so that the restaurant could not use the plaza.

Plaintiff states that defendant waited until March 17, 2003, a year later, to select a contractor to perform work on the exterior of the building. Defendant selected third-party defendant Accura Restoration, Inc., that proposed to finish the job within 150 days.

According to plaintiff, by May of 2004, the contractor had 35% of the work to do, and much of the scaffolding remained in place, although the contractor removed some scaffolding around that time. Plaintiff asserts that the contractor eventually completed the job and removed

the scaffolding on February 7, 2005.

Meanwhile, plaintiff commenced this action in May 2004, asserting six causes of action based on breach of contract and negligence, as well as a claim for injunctive relief. In the complaint, plaintiff alleges that defendant's unreasonable delay in completing the work and removing the scaffolding caused damages in the form of diminished sales and lost profits. Plaintiff also asserts that it was forced to expend additional money on advertising in order to attract customers to the restaurant. It further asserts that, because of the decline in sales and profits, it lost certain economic opportunities, including an opportunity to expand its New York presence by acquiring a location next to Madison Square Garden.

Defendant interposed an answer in July 2004, containing four counterclaims based on breach of contract. In a decision dated April 7, 2005, this court granted defendant partial summary judgment and dismissed plaintiff's third cause of action for breach of section 26.01 of the lease, that addressed changes and repairs to the interior of the building, such as stairways, pipes, elevators and corridors. The court also dismissed the sixth cause of action, for injunctive relief, and the request for punitive damages. The court declined to dismiss the claim for negligence, finding that questions of fact existed with respect to whether the defendant acted reasonably in carrying out its duty to comply with Local Law 11.

The court also declined to dismiss the claim for breach of section 16.02 of the lease and the claim for breach of the covenant of quiet enjoyment, finding that questions of fact existed with respect to both claims. Finally, the court declined to dismiss the claim for breach of the implied covenant of good faith and fair dealing, finding that it was not inconsistent with the lease provisions that governed the landlord's liability for work it conducted at the premises.

Both sides now move for summary judgment.

A party seeking summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact from the case. (Winegrad v NYU Medical Center, 64 NY2d 851 [1985]; Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]). The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

## 2. Business Interruption Insurance

As a threshold issue, defendant contends that the court should dismiss the complaint based on sections 18.01(iii) and 21.01(A) of the lease, that require plaintiff to acquire business interruption insurance. Section 18.01 states:

Tenant shall secure and keep in full force and effect throughout the Term, at Tenant's sole cost and expense...Business Interruption or Extra Expense coverage...on an "all risks" basis...reimbursing Tenant for direct and indirect loss of earnings and including coverage for rents payable under this Lease..."

Section 21.01(A) of the lease provides:

...The [Landlord] shall not be liable, to the extent of Tenant's insurance coverage, for any loss or damage to any person or property even if caused by such party's negligence or tortious acts...

Plaintiff obtained a policy that provides, in relevant part:

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the premises...caused by or resulting from any Covered Cause.

Operations is defined as "business activities occurring at the described premises."

Defendant relies on Duane Reade v 405 Lexington, LLC (22 AD3d 108 [1st Dept 2005]). Plaintiff Duane Reade was a commercial tenant in the Chrysler Building, that required extensive renovations. Duane Reade and the defendant landlord executed an agreement in which Duane Reade moved, pursuant to a long-term lease, into an adjacent building that the defendant also owned. Duane Reade brought an action for lost profit damages, claiming that the renovation work was performed in a grossly negligent manner, “which drove away its customers due to the erection of scaffolding [and] the presence of construction debris...” (Id. at 110).

The Appellate Division, First Department affirmed the dismissal of Duane Reade’s claim, finding that, pursuant to the lease, the owner had not been required to obtain insurance against the interruption of the tenant's business, whereas the tenant was required to obtain this insurance. (Id. at 112). The court therefore found that the parties intended that the landlord would not be liable for the tenant's business losses if an insurable event occurred. (Id.).

Here, defendant argues that the Duane Reade decision compels dismissal of the complaint because Section 18.01 of the lease required plaintiff to obtain business interruption insurance. Defendant argues that, as in the Duane Reade case, it was relieved of any liability for plaintiff’s business losses and plaintiff must look to its insurance carrier in the event of these losses. Plaintiff argues that the business interruption policy does not apply here because there was not a total interruption or cessation of its business, as the policy required. And, it is undisputed that plaintiff did not plead that a total interruption of its business occurred.

Defendant has not demonstrated that the Duane Reade decision compels dismissal of this action. Unlike that case, the defendant here has not adequately demonstrated that the parties intended that plaintiff’s sole remedy for its losses would be its insurance coverage. Moreover,

questions of fact exist as to whether plaintiff's own insurance covers the losses at issue.

In 54th Street Ltd Partners, LP v Fidelity and Guar Ins Co (306 AD2d 67 [1st Dept 2003]), the insurance policy at issue provided that, for business interruption coverage to be triggered, there had to be "necessary suspension" of the insured's "business operations." The First Department construed this provision as requiring a "total interruption or cessation" of operations. (Id.; see Broad Street, LLC v Gulf Ins Co, 37 AD3d 126, 132 [1st Dept 2006] [the term suspension connotes a temporary, but complete, cessation of activity]; Royal Indem Co v Retail Brand Alliance, Inc, 33 AD3d 392 [1st Dept 2006]).

In the case at hand, the policy similarly states that plaintiff was covered for loss of business income sustained due to the "necessary suspension" of its "operations." (See Policy #7470761 attached to letter dated February 14, 2007 from Zoe F. Feinberg, Esq.). Thus, defendant, as the movant, has the burden of demonstrating that a total interruption or cessation of plaintiff's business occurred, that would trigger the business interruption policy. (See 54th Street Ltd Partners, LP v Fidelity and Guar Ins Co, supra at 67).

Defendant has not demonstrated here that there was a total interruption of the plaintiff's business. Therefore, defendant has not demonstrated that there was a triggering of plaintiff's business interruption policy or that plaintiff is required to look to its carrier in connection with its alleged losses. Thus, the court denies the motion for summary judgment dismissing the complaint on these grounds.

### **3. Quiet Enjoyment of the Premises**

Plaintiff's first cause of action asserts that defendant breached plaintiff's right to peaceably and quietly enjoy the premises throughout the lease term, pursuant to Section 30.01 of

the lease, without defendant's hindrance. Specifically, plaintiff asserts that for two years, beginning in February of 2002, plaintiff was forced to operate its business with a sidewalk shed and with large amounts of scaffolding and construction debris in front of the premises. These items allegedly prevented plaintiff from presenting its restaurant as a "first-class" business. Further, the allegedly unreasonable delay in making the repairs to the building deprived plaintiff of its ability to effectively operate its business and enjoy the use of the premises "without hindrance."

"To prevail on a cause of action for breach of the covenant of quiet enjoyment, a tenant 'must show an ouster, or if the eviction is constructive...an abandonment of the premises.'"; (Reade v Reva Holding Corp, 30 AD3d 229, 237 [1st Dept 2006], quoting Herstein Co v Columbia Pictures Corp, 4 NY2d 117, 121 [1958]). "In the absence of a sufficient allegation of 'an eviction, actual or constructive, there is no breach of the covenant of quiet enjoyment.'" (Id., quoting Herstein, supra at 121).

Here, it is undisputed that there is no allegation of an eviction, either partial or constructive. Further, plaintiff has not presented any evidence to demonstrate that any questions of fact exist as to whether there was a partial or constructive eviction. Therefore, the court dismisses the claim for breach of the covenant of quiet enjoyment.

#### **4. Breach of Contract - Section 16.02**

Plaintiff's second cause of action asserts that defendant breached section 16.02 of the lease. This section required the defendant to make or cause to be made all necessary repairs to the interior or exterior of the building and to keep the building in good order and repair. The section further required the defendant to "endeavor not to unreasonably interfere with the

[plaintiff's] use and occupancy of the Premises in making any repairs or performing any maintenance required" under section 16.02.

In the April 7, 2005 decision, this court found that factual questions existed as to whether defendant had breached its obligation not to unreasonably interfere with plaintiff's use and occupancy of the premises. The court now finds that these factual questions still exist about this claim and defendant has not presented any evidence to demonstrate that it is entitled to judgment as a matter of law dismissing this claim. For the same reasons, the court also denies plaintiff's motion for summary judgment on this claim.

#### **5. Good Faith and Fair Dealing**

Plaintiff's fourth cause of action asserts that defendant breached the implied covenant of good faith and fair dealing. Specifically, plaintiff alleges that the defendant intentionally disregarded plaintiff's rights under the lease by unreasonably delaying repairs to the building, by prematurely erecting the sidewalk shed and scaffolding in front of the building and by using the plaza as a construction staging area.

"Under New York law, a covenant of good faith and fair dealing is implied in all contracts." (1-10 Industry Associates, LLC v Trim Corp of America, 297 AD2d 630, 631 [2d Dept 2002] [citations omitted]). "The implied covenant of good faith encompasses 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included' in the agreement, and prohibits either party from doing 'anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" (Id., quoting Dalton v Educational Testing Service, 87 NY2d 384, 389 [1995]).

This court previously declined to dismiss this claim, finding that questions of fact existed as to whether defendant had breached the implied covenant of good faith. Defendant argues that permitting this claim to go forward would nullify certain exculpatory language set forth in sections 21.01(A) and (B) of the lease. However, the court previously found that this claim was not inconsistent with the rest of the lease and defendant has not presented any additional evidence to demonstrate otherwise.

Defendant also argues that this claim would nullify plaintiff's obligation to obtain business interruption insurance and to look to its carrier for any alleged loss. However, as explained above, plaintiff obtained this insurance and defendant has not demonstrated, at this point, that plaintiff's only remedy is to look to its insurance carrier.

Plaintiff also moves for summary judgment on the claim for breach of the implied covenant of good faith. However, as set forth above, questions of fact exist which preclude judgment as a matter of law on this claim.

## **6. Negligence**

Plaintiff's fifth cause of action asserts that defendant's "premature installation of the sidewalk shed and scaffolding, excessive delays in obtaining approval to start the repair work, actually starting the repair work and completing the repair work, and using the [p]remises and [p]laza as a construction staging area were...negligent." Plaintiff further alleges that the defendant is liable for any injuries to the plaintiff's business because of defendant's negligence, pursuant to section 21.01 B of the lease.

This court previously declined to dismiss this claim on the grounds that questions of fact

existed with respect to whether the defendant was negligent in carrying out its duty to comply with Local Law 11, including putting up the scaffolding and shed in front of plaintiff's restaurant. The court noted that the job took over 1000 days to complete when the contractor scheduled completion within 150 days.

Defendant seeks summary judgment dismissing this claim. However, factual questions still exist as to whether defendant's conduct was negligent and defendant has not otherwise demonstrated that this claim should be dismissed. For the same reasons, the court denies plaintiff's motion for summary judgment on this claim.

#### **7. Counterclaims**

Plaintiff also seeks summary judgment dismissing defendant's counterclaims. Defendants withdrew the First Counterclaim pursuant to a stipulation dated February 16, 2006.

The Second Counterclaim arises in connection with an apartment plaintiff rented in the building, that plaintiff surrendered at some point during the term of the lease. Defendant alleges that, in exchange for that surrender, plaintiff agreed to release defendant from any claims for damages arising from the Local Law 11 work.

Defendant has presented no evidence of such an agreement. Moreover, it has not opposed plaintiff's motion to dismiss this claim. Therefore, the court dismisses this counterclaim.

The Third Counterclaim alleges that defendant permitted plaintiff to erect and maintain signage different from and in addition to the signage permitted by the lease, in exchange for plaintiff's agreement to release defendant from any claims for damages arising out of the Local

Law 11 work, including the building and maintenance of the scaffolding and sidewalk shed.

Plaintiff moves to dismiss this claim on the grounds that the parties never entered into this agreement. In opposition, defendant again has not presented any evidence of an agreement. Therefore, the court dismisses this claim.

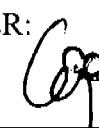
The Fourth Counterclaim asserts that defendant is entitled to recover its attorneys' fees and other expenses it incurred in defending this action, pursuant to section 14.01 of the lease. However, that section applies to situations in which the tenant has defaulted in connection with a given section of the lease. Defendant has not alleged any default under the lease. Defendant has also not demonstrated any other basis for the imposition of attorneys' fees. Therefore, the court dismisses this claim. Accordingly, it is

ORDERED that defendant's motion for summary judgment (sequence number 003) is granted to the extent that the first cause of action is dismissed and the motion is otherwise denied; and it is further

ORDERED that plaintiff's motion for summary judgment (sequence number 004) is granted to the extent that the second, third and fourth counterclaims are dismissed and the motion is otherwise denied; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: July 06, 2007

ENTER:   
J.S.C.  
**FILED**  
JUL 11 2007  
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COUNTY CLERK'S OFFICE