

Vanderbilt Holdings, LLC v Greenpoint-Goldman Corp.

2007 NY Slip Op 32270(U)

July 17, 2007

Supreme Court, New York County

Docket Number: 0107408/2005

Judge: Bernard J. Fried

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BERNARD J. FRIED
J.B.C.

PRESENT: _____
Justice

FBEM

PART 27

Vanderbilt Holding

INDEX NO. 107408/05

- v -

MOTION DATE _____

Greenpoint

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

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 _____

FILED

JUL 18 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 7/17/07



BERNARD J. FRIED J.S.C.
J.B.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

RETURNED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 60

-----X
VANDERBILT HOLDINGS, LLC,

Plaintiff,

- against -

GREENPOINT-GOLDMAN CORP.,

Defendant.
-----X

Index No. 107408/05

Seq. No. 004

FRIED, J.:

In this action seeking, *inter alia*, specific performance of an assignment provision in a written lease agreement, plaintiff, Vanderbilt Holdings, LLC (“Vanderbilt”), moves, pursuant to CPLR 3212, for summary judgment on the first through sixth causes of action in the second amended Complaint.

Vanderbilt is a tenant in premises owned by defendant, Greenpoint-Goldman Corp. (“Greenpoint”), at 470 Vanderbilt Avenue, Brooklyn, New York (the “subject premises”). The parties’ written lease agreement, dated February 2, 2000, expires on February 1, 2077.

Article 12 of the lease permits Vanderbilt to assign its interest with Greenpoint’s prior consent. Article 12 also states that Greenpoint cannot withhold or delay its consent, provided that the assignee or assignee’s guarantor has a net worth of at least \$35 million and Vanderbilt is not in default of its obligations under the lease.

Under article 38 of the lease, Vanderbilt waives any claim based upon an assertion that Greenpoint unreasonably withholds or delays its consent to an assignment, as permitted by Article 12. Furthermore, Vanderbilt’s sole remedy is “an action or proceeding to enforce any such provision or for specific performance, injunction or declaratory judgment.”

Vanderbilt sought to assign the lease. Specifically, in March 2004, Vanderbilt entered into a Sale-Purchase Agreement with New Stadium LLC (“New Stadium”), to assign the Lease to New Stadium. Greenpoint declined Vanderbilt’s request for consent to the assignment, citing, *inter alia*, several unresolved violations and undischarged mechanics liens.

Vanderbilt commenced an action, entitled *Vanderbilt Holdings, LLC v Greenpoint-Goldman Corp.*, Sup Ct, NY County, Index No. 109788/04, seeking, *inter alia*, to compel Greenpoint to consent to the assignment. However, Vanderbilt discontinued the action when it terminated the Sale-Purchase Agreement with New Stadium.

New Stadium also commenced an action, entitled *New Stadium LLC v Greenpoint-Goldman Corp.*, Sup Ct, New York County, Index No. 600493/05 (the “New Stadium action”). The Complaint in that action alleged causes of action for tortious interference with contract, tortious interference with prospective economic advantage, breach of contract-third party beneficiary, and specific performance-third party beneficiary. However, by order, dated August 31, 2006, this Court (Cahn, J.), granted Greenpoint’s motion to dismiss the complaint in the New Stadium action (*see Rosenberg Affirm, Exh A*).

Vanderbilt made further attempts to assign the Lease. In March 2005, Vanderbilt requested that Greenpoint consent to the assignment of the lease to Extell Vanderbilt, L.P. (“Extell”). Gary Barnett, a principal of Extell, agreed to personally guarantee Extell’s obligations as a result of the assignment. Vanderbilt asserted that Barnett had a net worth in excess of \$35 million. However, Greenpoint declined to consent to the assignment unless Vanderbilt provided Greenpoint with certain specified documents and agreed to indemnify Greenpoint in the New Stadium action. This action ensued.

The original Complaint alleged seven causes of action, seeking (1) judgment declaring that the only conditions precedent to Vanderbilt's right to assign the lease are that Vanderbilt not be in default of the lease and that the assignee or assignee's guarantor have a net worth of \$35 million; (2) judgment declaring that Vanderbilt has satisfied the requirements of Article 12 of the lease and is free to assign its interest; (3) rescission of the lease on the ground of fraud in the inducement; (4) restitution on the ground of fraud in the inducement; (5) breach of the implied covenant of good faith and fair dealing; (6) intentional interference with contract; and (7) tortious interference with prospective economic advantage. The gravamen of the pleading was that Greenpoint unreasonably withheld its consent to the assignment even though Vanderbilt satisfied all of the requirements for obtaining consent.

Greenpoint moved to dismiss the Complaint. By order, entered December 13, 2005, this Court (Cahn, J.) granted the motion as to the third through seventh causes of action, and denied it as to the first and second causes of action.

Thereafter, by Twenty (20)-Day Notice to Cure, dated March 24, 2006 ("Notice to Cure"), Greenpoint alleged that Vanderbilt was in default of its obligations under the lease because (1) a Temporary Certificate of Occupancy ("TCO") for the subject premises, which took effect on December 8, 2005, expired on March 6, 2006; (2) four violations issued by the New York City Department of Buildings ("DOB"), between September 1992 and October 1993, had not been resolved; (3) two violations issued by the New York City Department of Transportation ("DOT"), had not been resolved; and (3) a mechanic's lien filed against the subject premises on March 7, 2006 had not been discharged.

In April 2006, Vanderbilt entered into a contract with Atara Atlantic, LLC ("Atara Atlantic"), to assign its interest in the lease to Atara Vanderbilt, LLC ("Atara Vanderbilt"), an entity to be

formed, of which Atara Atlantic would be the majority owner and managing member. Allen I. Gross, president of Atara Atlantic, agreed to guarantee Vanderbilt's obligations as a result of the assignment. Vanderbilt provided a letter from a certified public accountant, dated April 10, 2006, stating that Mr. Gross' net worth exceeds \$35 million, and requested that Greenpoint consent to the assignment of the lease to Atara Vanderbilt. Greenpoint declined to consent, and Vanderbilt filed an amended Complaint alleging causes of action for (1) specific performance of Greenpoint's obligation under the Lease to consent to the proposed assignment; (2) an injunction compelling Greenpoint to consent to the assignment; (3) judgment declaring that Greenpoint unreasonably withheld consent to the assignment; (4) judgment declaring that the Notice to Cure is defective, null, and void; (5) judgment declaring that Vanderbilt is not in default of its obligations under the lease; (6) a yellowstone injunction; (7) an injunction restraining Greenpoint from taking steps to terminate the lease based on the Notice to Cure; (8) breach of the covenant of quiet enjoyment; (9) breach of the covenant of good faith and fair dealing; and (10) attorney's fees.

Vanderbilt moved for a yellowstone injunction restraining Greenpoint from taking any steps to terminate the lease based on the Notice to Cure. Vanderbilt essentially asserted that all of the issues raised in said Notice to Cure had already been resolved or waived when Greenpoint issued an Estoppel Certificate.

Greenpoint cross-moved to dismiss the amended Complaint, essentially asserting that Vanderbilt's request for consent to the assignment was premature since Atara Vanderbilt had not yet been formed.

By order, entered May 17, 2006, this Court (Cahn, J.), granted the yellowstone injunction and granted so much of the cross motion as sought to dismiss the first, second, third, seventh, ninth, and tenth causes of action, as well as the claim for punitive damages in the eighth cause of action, "with

leave to renew after an entity to which the plaintiff seeks to assign its lease is properly formed, is authorized to do business in this state and its request to assign to such entity has been turned down by the defendant” (Order, Not of Mot, Exh 36).

Thereafter, Vanderbilt and Atara Atlantic modified their agreement to permit Vanderbilt to form Atara Vanderbilt and transfer a controlling interest in Atara Vanderbilt to Atara Atlantic. Vanderbilt subsequently formed Atara Vanderbilt and requested that Greenpoint consent to the assignment based on the modified agreement. Greenpoint again declined to consent to the assignment, and Vanderbilt sought leave to renew its claims which were previously decided by the Court’s May 17, 2006 decision and order. By order, entered June 14, 2006, this Court (Cahn, J.) granted the motion to the extent of permitting Vanderbilt to serve and file an additional amended complaint.

Vanderbilt filed this second amended Complaint alleging causes of action for (1) specific performance of Greenpoint’s obligation under the lease to consent to the proposed assignment; (2) a permanent injunction compelling Greenpoint to consent to the proposed assignment; (3) judgment declaring that Vanderbilt is entitled to proceed with the proposed assignment; (4) judgment declaring that the Notice to Cure is defective, null, and void; (5) judgment declaring that Vanderbilt is not in default under the lease; (6) a yellowstone injunction restraining Greenpoint from terminating the lease; and (7) breach of the covenant of quiet enjoyment of the leased premises.

Greenpoint answered generally denying the allegations in the second amended Complaint. Greenpoint also asserts as affirmative defenses that Vanderbilt’s claims are barred by the Statute of Frauds and the doctrines of waiver, estoppel, and unclean hands.

Vanderbilt now seeks summary judgment on the first through sixth causes of action in the second amended Complaint, and dismissing Greenpoint’s affirmative defenses.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the second amended Complaint alleges claims for specific performance of Greenpoint's obligation under the lease to consent to the proposed assignment (first cause of action); a permanent injunction compelling Greenpoint to consent to the proposed assignment (second cause of action); judgment declaring that Vanderbilt is entitled to proceed with the proposed assignment (third cause of action); judgment declaring that the Notice to Cure is defective, null, and void (fourth cause of action); judgment declaring that Vanderbilt is not in default under the lease (fifth cause of action); a yellowstone injunction restraining Greenpoint from terminating the lease (sixth cause of action); and breach of the covenant of quiet enjoyment of the leased premises (seventh cause of action). As further stated, Vanderbilt's remedies in the event that Greenpoint unreasonably withholds or delays consent are limited to specific performance, injunction, or declaratory judgment.

Vanderbilt maintains that it is entitled to summary judgment on the causes of action seeking specific performance of Greenpoint's obligation under the lease to consent to the proposed assignment (first cause of action); a permanent injunction compelling Greenpoint to consent to the

proposed assignment (second cause of action); and a judgment declaring that Vanderbilt is entitled to proceed with the proposed assignment (third cause of action).

It is well established that “[a] lease is to be interpreted as a whole and construed to carry out the parties’ intent, gathered, if possible, from the language of the lease” (*Papa Gino’s of America, Inc. v Plaza at Latham Assocs.*, 135 AD2d 74, 76 [3d Dept 1988][internal citations omitted]). Furthermore, where the language of a contract is clear and unambiguous, no resort may be had to extrinsic or parol evidence of the intentions of the parties” (*id.*). Moreover, “[t]he determination of whether a term in a contract is ambiguous is a question of law for the courts” (*Elletson v Bonded Insulation Co.*, 272 AD2d 825, 827 [3d Dept 2000]). In addition, “[i]t has long been the law that covenants seeking to limit one’s right to assign a lease are ‘restraints which courts do not favor. They are construed with the utmost jealousy, and very easy modes have always been countenanced for defeating them’” (*Rowe v Great Atlantic & Pacific Tea Co.*, 46 NY2d 62, 69 [1978], quoting *Riggs v Pursell*, 66 NY 193, 201 [1876]).

This Court (Cahn, J.) has previously concluded that Article 12 of the subject lease is unambiguous (*see* Order, entered December 13, 2005, Not of Mot, Exh 31, p. 5). Thus, the issue presented on this motion is whether Vanderbilt complied with the prerequisites in the lease for obtaining consent to the proposed assignment.

As stated, the prerequisites to assignment set forth in Article 12 of the lease are that the assignee or assignee’s guarantor has a net worth of at least \$35 million, and that Vanderbilt not be in default of its obligations under the lease beyond the applicable notice to cure periods (*see* Order, entered December 13, 2005, Not of Mot, Exh 31, pp. 4-5). As to the first prerequisite, Allen I. Gross, president of Atara Atlantic, is the guarantor. Article 12 specifically and only mentions an accountant’s verification. Vanderbilt satisfies this prerequisite by providing Greenpoint with a letter,

dated April 10, 2006, from the accountants for Gross stating that his net worth exceeds \$35 million (*see* Not of Mot, Exh 32).

As to the second prerequisite, Vanderbilt asserts that it is not in default of the lease, and submits various documents to support its position that the conditions alleged in the Notice to Cure have been eliminated. In particular, Vanderbilt offers two TCOs, one in effect from March 3, 2006 to June 1, 2006, and the other in effect from June 8, 2006 to September 6, 2006, replacing the TCO that expired on March 6, 2006 (*see* TCOs, Not of Mot, Exh 48). Vanderbilt also submits Notices of Satisfaction from the DOB and DOT establishing that the violations have been resolved (*see* Notices, Not of Mot, Exh 51), as well as an Estoppel Certificate, executed by Greenpoint on June 16, 2004, after the issuance of the Notice to Cure, stating, *inter alia*, that “[t]o Landlord’s knowledge, no event has occurred or is continuing which could constitute a default by either Tenant or Landlord under the Lease ...” (Landlord Estoppel Certificate, Not of Mot, Exh 50). Greenpoint’s execution of the Estoppel Certificate, in June 2004, bars any claim that the pre-existing violations constitute a default under the lease (*see* *JRK Franklin, LLC. v 164 East 87th Street, LLC.*, 27 AD3d 392 [1st Dept 2006]). In addition, Vanderbilt submits a Satisfaction of Mechanic’s Lien, dated March 30, 2006 (Satisfaction of Mechanic’s Lien, Not of Mot, Exh 49).

On review of the submissions, it is evident that Vanderbilt sufficiently establishes that it fulfilled the prerequisites to assignment set forth in Article 12 of the lease. The submissions clearly establish that the proposed assignor has the required net worth, and that Vanderbilt is not in default of its obligations under the lease beyond the applicable notice to cure periods. As such, Vanderbilt establishes entitlement to judgment as a matter of law on its claim for specific performance of Greenpoint’s obligation under the lease to consent to the proposed assignment.

Greenpoint fails to offer any evidence to establish the existence of triable issues of fact. Greenpoint's reliance on the existence of the New Stadium action and Vanderbilt's refusal to indemnify it in that action as a basis to withhold consent was rejected by the Court in a prior decision involving another prospective assignee (*see* Order, entered December 8, 2005, Not of Mot, Exh 31, p. 5). Furthermore, contrary to Greenpoint's position, the allegations in the New Stadium action do not trigger any indemnification obligations on the part of Vanderbilt. The lease requires Vanderbilt to indemnify Greenpoint only for actions arising out of (1) a breach of the lease by Vanderbilt; (2) a tax or legal requirement contest initiated by Vanderbilt under Article Two or Article Four of the lease; or (3) personal injury or property damage suffered on the subject premises (*see* Lease, Article Six, Not of Mot, Exh. 3). The allegations in the New Stadium action involve Greenpoint's failure to consent to the assignment. In any event, Greenpoint's assertion is rendered moot by the order dismissing the New Stadium action (*see* Rosenberg Affirm, Exh A).

Moreover, Greenpoint's assertion that Vanderbilt is in default of its obligations under the lease because of additional violations, including multiple elevator violations and violations issued by the New York City Environmental Control Board ("ECB") not included in the Notice to Cure, is simply unavailing. Equally unavailing is Greenpoint's contention that Vanderbilt did not explain how the assignment transaction was structured or provide any of the agreements among Vanderbilt, Atari Vanderbilt, and Atari Atlantic. As stated by the Court (Cahn, J.) in a prior decision, "anything outside of the two prerequisites listed in Article 12 is irrelevant to the issue of consent to assignment and cannot serve as a valid excuse for [Greenpoint] to refuse consent" (Order, entered December 8, 2005, Not of Mot, Exh 31, p. 5). Thus, the request for summary judgment on the first cause of action is granted.

The second cause of action seeks a permanent injunction compelling Greenpoint to consent to the proposed assignment. The third cause of action seeks a judgment declaring that Vanderbilt may properly proceed with the proposed assignment. These claims are redundant of the first cause of action seeking specific performance. As such, the branch of the motion seeking summary judgment on the second and third causes of action is denied, and the claims are dismissed (*see* CPLR 3212[b]).

The request for summary judgment on the fourth cause of action, which seeks a judgment declaring that the Notice to Cure is defective, null, and void, is also denied. It is well established that a notice to cure must specifically advise the tenant of the alleged defaults and the consequences of the tenant's failure to remedy such default within a fixed period of time (*see Filmtrucks, Inc. v Express Indus. & Terminal Corp.*, 127 AD2d 509, 511 [1st Dept 1987]). Here, Vanderbilt claims that the Notice to Cure misidentifies alleged DOT violations, and is ambiguous as to the alleged defaults, required actions, and consequences of Vanderbilt's failure. However, since Vanderbilt's assertion that it satisfied the requirements for consent to assignment is based, in part, on its position that it resolved the alleged defaults in the Notice to Cure, it cannot now claim ignorance as to said alleged defaults.

The request for summary judgment on the fifth cause of action, seeking a declaration that Vanderbilt is not in default of the lease as alleged in the Notice to Cure, is also denied. Furthermore, the fifth cause of action is dismissed as redundant of the first cause of action (*see* CPLR 3212[b]).

The sixth cause of action seeks a yellowstone injunction enjoining Greenpoint from taking steps to terminate the lease based on the Notice to Cure, commencing an action to obtain possession of the subject premises, or otherwise attempting to obtain possession of the property based upon the

Notice to Cure. Vanderbilt is entitled to summary judgment on this cause of action given the conclusion that it is not in default of the Notice to Cure.

The request for summary judgment dismissing Greepoint's conclusory affirmative defenses is granted (*see* CPLR 3013; *Glenesk v Guidance Realty Corp.*, 36 AD2d 852, 853 [2d Dept 1971]).

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant on the first and sixth causes of action, and summary judgment dismissing defendant's affirmative defenses; and it is further

ORDERED that the Court grants summary judgment dismissing the second, third, and fifth cause of action in the second amended Complaint; and it is further


ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and shall continue as to the fourth and seventh causes of action.

Dated:

3/17/07

ENTER:



J. S. C.