Barleen, LLC v S&K Convenience, Inc.
2007 NY Slip Op 33027(U)
September 18, 2007
Supreme Court, Nassau County
Docket Number: 2666-06/
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 12

BARLEEN, LLC and D.L. HART AND CO., INC.,

Plaintiffs,

INDEX NO.: 012666/2006
MOTION DATE: 07/20/2007
MOTION SEQUENCE: 001

-against-

S&K CONVENIENCE, INC., RICHARD DUBI, KAREN DUBI, PASQUALE PERROTTA & SUSAN PERROTTA,

Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed........ 1
Memorandum of Law in Support of Motion for Summary Judgment........ 2
Affidavit of Richard Dubi in Opposition & Attachment........ 3
Memorandum of Law in Opposition........ 4
Affidavit in Reply and in Further Support of Motion for Summary Judgment of Sanford Strenger........ 5
Reply Memorandum of Law in Further Support of Motion for Summary Judgment....... 6

This motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff and against defendants on the counterclaims designated one, two, three, four, five, six and eight, and the second, fifth and sixth affirmative defenses is determined as follows.

Plaintiff, the Landlord, commenced this action to recover past due rent, and arrears under a purchase agreement. The parties had a Lease and a Purchase Agreement to operate a gasoline

station on the premises situate at 118 Newbridge Road in Hicksville commencing June 1, 2004, for four years. The gasoline was to be purchased from plaintiff D.L. Hart & Co.; the Lease was with plaintiff Barleen LLC. In what is known as a tying arrangement, a condition of leasing the premises was the Tenant's commitment to purchase gasoline, allegedly at a quantity and price set in the sole discretion of plaintiff. The two contracts had interdependent default provisions.

In a prior lawsuit the Tenant sought a Yellowstone Injunction, (Index No:6443/05). After the Landlord declared a default due to the Tenants' failure to sell the quantity of gasoline set in the Purchase Agreement, the Tenants argued that the tying arrangement prevented them from shopping for and purchasing gas at a lower price and consequently from competing with other gas stations in the immediate environs. See Complaint, Index No 6443/05, ¶¶ 16, 17, 28 and 33. Styled as a violation of the State's Donnelly Act, B.C.L. § 340, they complained that they were prevented from purchasing gasoline and related sundry items from competitor distributors at a lower cost. Complaint ¶ 20. Paragraph 29 of the Complaint pleads:

> The tying arrangement between the Plainview Lease Agreement and Plainview Purchase Agreement, couple with D.L. Hart's fixing the quantity and price of gasoline and related sundry items associated with gasoline service stations sold to the public, constitutes a contract, agreement, arrangement or combination whereby competition or the free exercise of activity in the conduct of the business or trade by P & R is restrained.

The fifth cause of action was concerned with the quick service restaurant the Tenant built but could not operate since the Landlord would not sign the necessary permits.

In a decision and order dated July 11, 2005, the arguments were rejected; no injunction issued and the complaint was dismissed. Plaintiff had moved twice for an injunction against terminating the Lease and defendant cross-moved to dismiss. The court held that there was nothing per se illegal about a tying arrangement and one only becomes so where there is sufficient economic power to establish control and dominance over the market which leaves the purchaser with no viable alternative or ability to get at a competitive product. SFO at p. 4. The first four causes of action were dismissed because the Tenants had not pled, nor could they have shown, that defendant, who had only two gas stations, had "market share." The tying

arrangement between these two parties was more in the nature of a bargain improvidently entered into than a one sided commercial bargain.

The court also held that there was no dispute that there had been full disclosure of prior sales at the Hicksville gas station. Id at p. 5. The fifth cause of action was dismissed insofar as the Tenants had not addressed the fact in their pleading that they were already in default when the Landlord withheld consent for the deli counter and that they had not abided with several relevant provisions in the Contract .

Upon dismissal of the complaint pursuant to CPLR 3211(a)(7), the Landlord planned to seek an order of eviction of a holdover tenant but the Tenant surrendered the premises and it is under these circumstances that the present action to recover past due monies proceeds.

Plaintiff moves for summary judgment on the grounds that the issues of restraint of competition which permeate the counter claims were litigated and decided in favor of plaintiff in the underlying action. Specifically, defendants allege that the quantity of gas, or the "high allocation clause", caused their financial downfall; that the lack of disclosure of prior sales of gasoline at the premises seduced them into agreeing to an impossible gasoline quota; and after they invested in building out a quick food eatery plaintiff refused to sign the necessary permits. Defendants argue they had no chance of succeeding at the gas station and only agreed to the high allocation clause because plaintiff told them it would be protection in circumstances of shortage, but would not be enforced under normal circumstances.

The issue to be determined, according to plaintiff, is whether the complaints now plead in defendants counterclaims either were or could have been determined in the initial lawsuit. Defendants disingenuously argue that although two motions for a Yellowstone Injunction and a cross motion to dismiss the complaint were filed in the earlier lawsuit, there was no substantive determination of any the issues. A review of the extensive papers reviewed on those motions, and the facts that Tenants put into play in their quest for relief of the terms of their Contract discloses the fallacy of that contention.

Res judicata, or claim preclusion, precludes claims where "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in

privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." Monahan v. New York City Dep't of Corrections, 214 F.3d 275, 284 (2d. Cir.2000). Collateral estoppel, or issue preclusion, bars re-litigation of an issue of law or fact that was "raised, litigated, and actually decided by a judgment in a prior proceeding between the parties, if the determination of that issue was essential to the judgment, regardless of whether or not the factual underpinnings are the same.

No new facts are plead in this action as compared to the earlier one, except plaintiff's alleged failure to post "zone prices.".

The several counterclaims rest upon a theory of breach of contract and fraud. For example the first counterclaim pleads that plaintiff made representations that were not in the contract, such as the gasoline quota would not be enforced, or that there would be rebates and offsets on the rent for the money and time spent on renovation and construction, but that he didn't perform them. Defendants allege that these promises when made were known to be false by plaintiff but were made anyway to induce them to enter into the contracts. Defendants assert that the absence of a standard merger clause demonstrates that the contracts were not the complete agreement between the parties, but other enforceable promises separate and distinct were made. By contrast the second counterclaim, at paragraphs 48 and 49, alleges that plaintiff entered into the Lease and Purchase Agreement in bad faith with the intent that he would "command" the breach of those contracts and therefore he "breached the Lease and Purchase Agreement".Answer ¶ 49. The third counterclaim similarly claims a breach of contract by Markowitz by violating his duty of good faith and fair dealing by hindering and harassing and generally preventing performance. See ¶ 55. The factual specifics of this counterclaim are that the Landlord and the Tenant recognized that a convenience store would be good for business but when the Tenant was unable to get a fast food franchise and spent its dwindling resources to build a deli counter, the Landlord would not sign the necessary permits for it to open.

Several reasons command dismissal of the first three counterclaims. They are dismissed when measured against the standard for summary judgment, *see,* Zuckerman v City of New York, 49 N.Y.2d 557, 562) (in the absence of disputed facts judgment may enter on the law).

and also on the sufficiency of the pleadings. See Cron v Hargro Fabrics, Inc., 91 N.Y.2d 362, 366 (1998) (the only duty of the court being to review the allegations stated in the complaint, take them as true and resolve all reasonable inferences in favor of plaintiff.)

Returning to the decision of July, 2005, any issue of fact or law concerning plaintiff's purported violation of G B L § 340 (the Donnelly Act) by unfairly restraining the Tenants right to chose its own gasoline distributor and setting the quantity of gasoline Tenant was required to purchase at a controlled price is no longer a subject that can be considered by this court. See Perrotta Aff. in Support of Yellowstone, ¶ 2. Annexed as Exh. F. A change in the focus on the perceived injustice imbedded in the Lease and Purchase Agreement from anti trust to fraud and breach of contract do not give the Tenant another go at avoiding the Lease and Purchase Agreement. They are the quintessential contract. The Law does not permit a claim of fraud on the basis of promises of performance in the future made in a contract. Non-Linear Trading v Braddis, 243 A.D.2d 107, 118 (1st Dept 1998) See Clarke-Fitzpatrick v Long Island, 70 N.Y.2d 382, 389 (1987) ("It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.") The alleged mis-representation of material facts integral to a claim of fraudulent inducement are not in this case facts at all but promises connected to the Contracts. The fact that defendants say the unkept promises were part of the Contracts and refer to the absent merger clause contradicts any claim that they were separate from the Contracts. If, indeed, the court were to accept defendants' representations that the written contract is not the entire agreement of the parties, the first, second and third counterclaims must be understood to assert a breach of contract. However, in moving for a Yellowstone Injunction the claim that defendant was in breach of promises made under the contract is critical to obtaining an injunction against termination of a leasehold. Under New York's transactional view of res judicata defendants are precluded from raising it now after their non-performance of the Contracts and the enforceability of them has been litigated and determined.

The third counterclaim similarly involves the Contract as it is asserted that plaintiff failed to act in good faith when it did not sign the permits to operate the food component of the gas

station.

It is not new law that every contract has an obligation to proceed in good faith and a covenant of fair dealing, Van Valkerburgh, Nooger & Nelville Inc. v Hayden Publishing Co., Inc., 30 N.Y.2d 34, 45 (1972); Silvester v Time Warner, 1 Misc.3d 250, 258 (NY Cty 2003), not just in the performance of obligations but in the enticement to contract in which case it's absence becomes a breach of a duty of care, i.e. fraud. Plaintiff's Contract has previously been vindicated, and this court finds no duty separate from the contract, and therefore no fraud in entering into the Contract. And, it has been litigated and decided that defendants had full disclosure on the Hicksville gas station before contracting for the Lease. Accordingly, the duty of good faith and fair dealing is barred under the doctrine of res judicata and the failure to state a cause of action.

The fourth counterclaim alleges that Landlord did not post the prices of gasoline for Tenant's class and location. The requirement to post is enunciated in the Purchase Agreement. It was not raised in the underlying action. In the underlying Yellowstone action, evidence of plaintiff's failure to comply with the challenged Purchase Agreement and tying provision was clearly a paramount factor in considering whether defendants' should be granted time to cure their default in purchasing their allotment. It was never asserted; defendants relied upon the illegality and restraint of trade of the Agreement. Not only is the claim barred by the doctrine of res judicata but also on the grounds of failure to state a claim. In reviewing a pleading for failure to state a cause of action the court is not required to assume the truth of every statement which lacks factual support. Elsky v KM Ins. Brokers, 139 A.D.2d 691 (2d Dept 1988).

The fifth counterclaim seeks to recover credit card payment for gasoline sold by defendants. The credit card system was used by defendants but the subscriber was plaintiff. The sum credited to plaintiff was litigated in the earlier action and is not such an integral inquiry in the enforce ability and performance of the Lease and Purchase Agreement that it is now barred under the doctrine of res judicata.

The sixth cause of action seeks a declaratory judgment that it is against public policy of the State of New York to allow service stations and gasoline distributors to agree to minimum gallonage clauses, and therefore the clause in the Purchase Agreement should not be enforced.

However, the argument advanced by defendant is a matter for the Legislature. Further, it seeks an advisory opinion which the court is not authorized to render.

The eighth cause of action seeks an accounting. It is a duplicate of the fifth cause of action and is dismissed.

Accordingly, on the basis of the foregoing it is ORDERED that plaintiff's motion is granted to the extent that the 1st, 2nd, 3rd, 4th, 6th and the 8th counterclaims are dismissed. It is further ORDERED that the second affirmative defense of unclean hands, the fifth affirmative defense of breach of contracts and the sixth which asserts the doctrine of prevention are dismissed for failure of proof.

A Certification Conference will be held in this action on October 10, 2007, at 9:30 A.M., to fix a schedule to proceed to trial on the damages sought by plaintiff.

Dated: September 18, 2007

J.S.C.

ENTERED
SEP 21 2007
NASSAU COUNTY
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