

**Globespan Telecommunications, LLC v 65
Broadway, LLC**

2007 NY Slip Op 33353(U)

October 12, 2007

Supreme Court, New York County

Docket Number: 0601045/2006

Judge: Shirley W. Kornreich

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

PRESENT: _____

PART 54

Index Number : 601045/2006

GLOBESPAN TELECOMMUNICATIONS

vs

65 BROADWAY

Sequence Number : 001

DISMISS ACTION

INDEX NO.

601045/06

MOTION DATE

8/16/07

MOTION SEQ. NO.

1

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for

Dismiss

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: Yes No

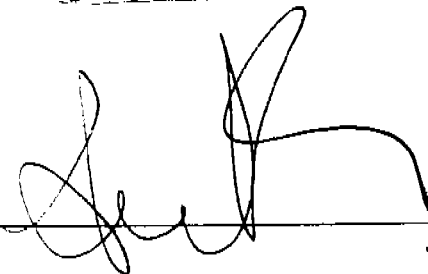
Upon the foregoing papers, it is ordered that this motion

FILED
OCT 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

JUDGE SHIRLEY WERNER KOPPRECH

Dated: 10/12/07



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
GLOBESPAN TELECOMMUNICATIONS, LLC,

Plaintiff,

- against -

65 BROADWAY, LLC, MARSAR WEST, LLC,
AM PROPERTY HOLDING CORPORATION
and DONNELLY MECHANICAL CORPORATION,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J:

FILED
OCT 18 2007
NEW YORK
COUNTY CLERKS OFFICE

In this negligence action, plaintiff Globespan Telecommunications, LLC (“Globespan”) seeks to recover \$761,019 for damaged telecommunications equipment and \$190,000 in lost income, allegedly caused by defendants’ failure to properly maintain their premises. Defendants 65 Broadway, LLC (“65 Broadway”), Marsar West, LLC (“Marsar”), and AM Property Holding Corporation (“AM Property”) (hereinafter collectively referred to as “Landlord”) now move for summary judgment.

Landlord alleges that: (1) plaintiff lacked legal existence and good standing at the commencement of this action, and thus, had no legal capacity to sue; and (2) plaintiff was not entitled to any benefits under the original lease agreement since there was no valid assignment between nonparty Globecom, the tenant-signatory on the lease, and plaintiff Globespan. In support of its motion, Landlord submits an affirmation of counsel; plaintiff’s amended verified complaint; an amended verified answer; a copy of the lease agreement; plaintiff’s 1065 Partnership Tax Form; defendants’ reply affirmation to plaintiff’s opposition, an excerpted

examination before trial of Globespan President Michael Hoffman; and an excerpted deposition of AM Property Vice President Paul Wasserman.

Plaintiff opposes the motion, contending that: (1) it has legal capacity to maintain this action; and (2) Landlord waived its right to object to Globespan's tenancy by accepting plaintiff's rent checks. In support of its opposition, plaintiff submits an affirmation of counsel and the following documents: an affidavit by plaintiff Hoffman; Globespan's Partnership Tax Form 1065; a copy of the lease agreement; copies of 30 rent checks paid to and endorsed by Landlord; a 2002 rent correspondence letter between Globespan and Landlord; plaintiff's summons and amended verified complaint; an amended verified answer; defendants' bill of particulars, an excerpted deposition of defendant Wasserman; an excerpted deposition of 65 Broadway Chief Engineer Mark Faith; an excerpted examination before trial of plaintiff Hoffman; and an excerpted deposition of Globespan Vice President Charles Young.

The evidence submitted by both parties focuses on plaintiff's legal standing and the validity of the lease assignment. The parties fail to acknowledge that a landlord-tenant relationship is not a requisite element for awarding damages to plaintiff in a negligence claim. Regardless of Globespan's tenancy status, Landlord had a common-law duty to maintain its premises in a reasonably safe condition. *Rivera v. Nelson*, 7 N.Y.3d 530, 533 (2006); *Putnam v. Stout*, 38 N.Y.2d 607, 611 (1976).

I. *Statement of Facts*

On July 8, 1999, 65 Broadway's agent, AM Property, and nonparty Globecom entered into a lease agreement ("Lease") for space on the fourth floor of the building owned by 65

Broadway and Marsar. Globecom occupied the leased space until January 2001, at which point, Globespan moved into the space. From 2001 until 2003, Globespan made rent payments to AM Property, using checks bearing its name, "Globespan Telecommunications LLC." AM Property endorsed and accepted 30 months of these rent checks. There is no evidence in the record that AM Property consented, in writing, to Globespan's tenancy as required by the Lease. Globespan alleges that prior to the flooding, Donnelly Mechanical Corporation ("Donnelly") installed an air conditioning unit in the ceiling of the Globespan space pursuant to Landlord's instruction. On January 10, 2004, a pipe burst in the subject office space, damaging Globespan's telecommunications equipment. Plaintiff brought suit against defendants alleging negligence in the air conditioner's installation; issue was thereafter joined.

The Lease and its supplemented rider agreement ("Rider") were signed by Wasserman and two Globecom representatives, Secretary and Treasurer Young and President Lawrence Nadel. Both documents contain maintenance and repair provisions and explicit non-assignment and non-waiver clauses.

II. *Argument*

Plaintiff contends that defendants' negligence in maintaining the subject premises in a reasonably safe condition caused a pipe to burst, flooding the premises and damaging plaintiff's equipment. Defendants argue that plaintiff lacks the legal capacity to bring this action since plaintiff's business was dissolved at the commencement of this suit. Plaintiff opposes, contending that this defense was not raised in defendants' answer, and therefore, was waived.

Plaintiff also argues that defendants waived any right to object to Globespan's tenancy by accepting plaintiff's rent checks with knowledge of plaintiff's occupancy. Defendants deny any such waiver, stating that no valid tenancy materialized because Landlord did not consent to a valid assignment in writing, as required by the Lease. Furthermore, the Lease contains unambiguous non-assignment and non-waiver clauses which the court must review with deference.

III. *Conclusions of Law*

A. *Summary Judgment*

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Additionally, when determining a motion for summary judgment based upon a written contract, "the construction of an unambiguous contract is for the court to pass on, and circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered when the intention of the parties can be gathered from the instrument itself." *Yanuck v. Paston & Sons Agency*, 209 A.D.2d 207, 208 (1st Dept. 1994).

The parties' disputes over plaintiff's legal capacity and valid assignment are analyzed but are ultimately immaterial to establishing liability in a negligence claim. Restatement 2nd of

Property (Landlord Tenant) Part 6 (fact of tenant-possessor involved in claim or some other possessor is irrelevant consideration in solving tort liability problems). *See also* Warren's Negligence in N.Y. Courts § 3.07 (duty owed by landowner determined by single standard of reasonable care regardless of plaintiff's status).

B. Plaintiff's Legal Capacity to Sue

Pursuant to CPLR § 3211(e), a defense based upon no legal capacity to sue is waived unless raised in motion before or in responsive pleading. *Wells Fargo Bank Minn. v. Mastropaolo*, 42 A.D.3d 239 (2nd Dept. 2007) (under CPLR § 3211(e), any objection or defense based on ground set forth in CPLR § 3211(a)(1), (3), (4), (5), (6) must be raised in answer or motion made before answer is due, or it is waived). Moreover, dissolved corporations may maintain or defend actions in the courts and “may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place.” Business Corporation Law § 1006(a); *See also Metered Appliances v. 75 Owners Corp.*, 225 A.D.2d. 338 (1st Dept. 1996) (while corporate dissolution may not affect corporation's right to carry on business for winding up its affairs, new business is prohibited absent reinstatement by payment of back taxes). Therefore, plaintiff has standing to bring this suit and Landlord, in failing to raise this defense in its answer or pre-answer motion, waived its right to such a defense. CPLR § 3211(e).

C. *Validity of Lease Assignment*

Although the complaint alleges negligence, defendants' argument focuses on the validity of the lease agreement, which, for purposes of the negligence analysis is irrelevant (as discussed below). In any event, because defendants are correct in their argument that no valid lease assignment existed here, the court includes a brief discussion of the relevant law on this issue.

It has been consistently held that courts must interpret a contract so as to give meaning to all of its terms and avoid "an interpretation that would leave contractual clauses meaningless." *Two Guys from Harrison-N.Y. v. S.F.R. Realty Assoc.*, 63 N.Y.2d 396, 403 (1984); *See also Mionis v. Bank of Julius Baer & Co.*, 301 A.D.2d 104, 109 (1st Dept. 2002); *Helmsey-Spear, Inc. v. New York Blood Ctr.*, 257 A.D.2d 64, 69 (1st Dept. 1999). Provision #11 of the Lease and #15 of the Rider explicitly require "prior written consent of the Owner" for an assignment to be valid. No such written consent of assignment is shown in the record. Furthermore, when plaintiff approached Wasserman to amend the lease, Wasserman stated that he would not change the lease name without plaintiff's proper financial documents, which plaintiff failed to tender. Wasserman Tr. 39-40.

The Lease and Rider also contain three specific clauses that relate to non-assignment and non-waiver rights. These clauses expressly state that collection of rent by the Owner shall not be deemed a waiver of covenant and that receipt of rent also is not a waiver "unless such waiver be in writing signed by Owner." Lease Provisions #11 & #25; Rider Provision #15. Despite these non-waiver clauses contained in the Lease, plaintiff contends that defendants' knowing

acceptance of the 30 months of rent checks without objection waived Landlord's right to deny plaintiff's tenancy.

However, plaintiff relies upon cases involving residential leases. *Lee v. Wright*, 108 A.D.2d 678, 680 (1st Dept. 1985) (32 rent payments over four years, without any effort by landlord to terminate tenancy, constituted waiver of non-waiver clause which provided that even if landlord failed to insist upon strict performance of any lease covenants, such failure shall not be construed as waiver or relinquishment of such covenant); *Rafolin Constr. Corp. v. Lippman*, 116 Misc.2d 926 (1982) (landlord-tenant relationship existed even though rent checks drawn from party not named on lease). Unlike the residential situations, courts have held specific waivers in commercial leases valid. *Cumberland Farms, Inc. v. ConocoPhillips Co.*, 2007 U.S. Dist. LEXIS 30878 (2007) (when faced with commercial leases containing specific no-waiver clauses, courts have refused to find waiver); *La Laterna, Inc. v. Fareri Enters*, 37 A.D.3d 420 (2nd Dept. 2007) (refusing to find waiver based on landlord's acceptance of rent with knowledge of default where commercial lease "specifically provided that acceptance of rent despite knowledge of a breach did not constitute a waiver of that breach, unless there was a written waiver"); *Excel Graphics v. CFG/AGSCB 75 Ninth Avenue*, 1 A.D.3d 65, 70 (1st Dept. 2003) (parties to commercial lease may mutually agree that conduct, which might otherwise give rise to inference of waiver, shall not be deemed waiver of specific bargained-for provisions of lease).

"It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms ..." *Id.* The Court of Appeals in *Jefpaul Garage Corp. v. Presbyterian*

Hosp., 61 N.Y.2d 442, 446 (1984) explained that “while [a] waiver may be inferred from the acceptance of rent in some circumstances, it may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise.” Consequently, no assignment occurred here.

D. *Negligence Claim*

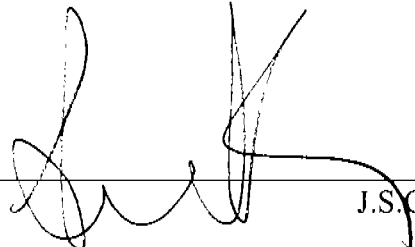
Nonetheless, defendants’ motion for summary judgment is denied. The instant complaint alleges negligence. New York has abolished the duty of a landowner as determined by the status of the plaintiff, and instead, has adopted a single standard of reasonable care. *Rivera v. Nelson*, 7 N.Y.3d 530, 533 (2006), citing to *Basso v. Miller*, 40 N.Y.2d 233 (1976). Thus, a negligence cause of action is legally sufficient without a showing of a landlord-tenant relationship pursuant to landlord’s common-law duty to reasonably maintain its premises in a reasonably safe condition. *Duane Reade v. Reva Holding Corp.*, 30 A.D.3d 229, 236 (1st Dept. 2006); *See also Perez v. Metro Museum of Art*, 304 A.D.2d 481 (1st Dept. 2003); *Putnam v. Stout*, 38 N.Y.2d 607, 617 (1976) (landlord liable for damages caused to others upon its property with lessee’s permission if lease required repair, lessor failed to exercise reasonable care in repair, and disrepair created unreasonable risk); *Laurence E. Jacobson v. 142 E. 16 Cooperative Owners, Inc. Et Al.*, 295 A.D.2d 211 (1st Dept. 2002) (landlord and managing agent under non-delegable duty to maintain rented premises in good repair and vicariously liable for negligence on part of independent contractor in effecting repairs).

In *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551 (1992) the Court of Appeals addressed the liability of a negligence action independent of contractual obligations. The Court held that the typical tortious nature of the injury removed the claim from the underlying contract and was permitted to “sound in tort.” *Id* at 552; *See also Duane Reade v. SL Green Operating Partnership, LP*, 30 A.D.3d 189 (1st Dept. 2006) (nature of injury and resulting damages are typical of tort claims and follow from landlord’s breach of its statutory duty to maintain premises in “good repair”); *Pop Cowboy, Inc. v. 175 West 73rd Street Realty Corp.*, 292 A.D.2d 300 (1st Dept. 2002) (burst pipe shown to have served entire building was sufficient to impose duty to repair on landlord). Here, Landlord had a non-delegable duty to properly maintain its premises regardless of Globespan’s tenancy status. *Laurence*, 295 A.D.2d 211. It remains disputed whether the burst pipe was proximately caused by Landlord’s breach of its duty. *Pop Cowboy*, 292 A.D.2d 300. Thus, the legal issue of negligence must necessarily be tried by a jury. Defendants’ motion for summary judgment, therefore, is denied. Accordingly, it is

ORDERED that defendants’ motion for summary judgment is denied.

ENTER

DATE: October 12, 2007
New York, NY



J.S.C.

FILED
OCT 18 2007
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JUDGE SHIRLEY WERNER KOHNREICH