

Bagel Place, Inc. v Monarch Holding Corp.

2007 NY Slip Op 33379(U)

October 16, 2007

Supreme Court, Suffolk County

Docket Number: 0018682/2003

Judge: Arthur G. Pitts

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M E M O R A N D U M

SUPREME COURT OF THE STATE OF N.Y.
COUNTY OF SUFFOLK

I.A.S. PART 43

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THE BAGEL PLACE, INC.,

By: Arthur G. Pitts, J.S.C.
Date: October 16, 2007
Index No.: 18682/03

Plaintiff,

Attorneys for Plaintiff

TIERNEY & TIERNEY

-against-

by: George W. Clarke, Esq.

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MONARCH HOLDING CORPORATION,

Defendant.

Attorneys for Defendant

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This non-jury trial of two consolidated actions that began on May 15, 2007 and was finally concluded on August 7, 2007 involved no fewer than ten causes of action, ten counterclaims, and claims for costs and sanctions including attorneys' fees based on allegations of frivolous conduct under NYCRR Part 130 Rules of the Chief Administrator.

Plaintiff leased space in defendant's shopping center. What began as a basic landlord/tenant dispute arising out of maintenance, lighting and parking issues mushroomed into claims for fraud and misrepresentation, prima facie tort, pursuit of negotiations in bad faith with breach of an agreement to release, wrongful interference with actual and prospective business relations, anti-Semitism, defamation, tortuous interference, and an alleged threat of physical violence between the attorneys in the case.

At the end of the case with all the proof in, this court finds that plaintiff has failed to prove by a preponderance of the credible evidence any of its ten causes of action. Similarly, the defendant has failed to prove by a preponderance of the credible evidence any of its ten counterclaims. Finally, all requests for costs and/or sanctions are hereby denied, as are any outstanding motions from the trial upon which decision was reserved.

Notwithstanding that this court's deliberations were made considerably more difficult by the fact that many of the claims and counterclaims were inartfully pleaded, what follows is an analysis of each claim and counterclaim.

As to the first cause of action in the amended complaint in the first action, plaintiff sought damages for loss of profit due to alleged inadequate parking in the shopping center. Plaintiff was relying on paragraph 31 of the lease which read in pertinent part, "Landlord reserves the right to promulgate reasonable rules and regulations with respect to parking and common areas." Plaintiff's theory was that defendant should be compelled to promulgate reasonable rules and regulations for the benefit of plaintiff, and by failing to do so was answerable in money damages. Such reliance by plaintiff is misplaced. There is no construction, no matter how tortured, that can transform a reservation of rights by one party to an agreement into an obligation to act at the insistence of the other party to the agreement.

As to the second cause of action in the amended complaint in the first action, plaintiff sought damages for loss of business due to allegations that defendant failed and refused to maintain lights in the common areas of the shopping center, including the parking lot and on the marquee. While the Court might have been receptive to the proof on liability for this cause of action, the proof as to damages was sorely lacking. The books and records of the plaintiff such as they were, coupled with the absolutely incredible testimony of the plaintiff's accountant and plaintiff's principals on the issue of employee compensation and employee tax status would have rendered any award of damages entirely speculative with no basis in the evidence at all.

As to the third cause of action in the amended complaint in the first action, plaintiff sought damages for loss of profits due to alleged failures of the defendant to remove snow, clean up and remove accumulations of leaves and debris, and failure to repair potholes in the parking lot. The preponderance of the credible evidence established that the snow, leaves and debris were cleaned up in a reasonably timely fashion, and the parking lot maintenance was adequate.

As to the fourth cause of action in the amended complaint in the first action, simply put, there was no credible evidence that the roof leaked. There may have been condensation coming off pipes that caused ceiling tiles to become stained, but that was not what the fourth cause of action asserted.

Turning to the counterclaims asserted in the amended answer in the first action, the first seems to be a demand for 11.2% of all common area charges as additional rent. But the clear testimony of defendant's principal was that those charges were waived unless the tenant sold/assigned the lease to anybody outside tenant's immediate family. In support thereof it is worth noting that there were apparently no periodic statements sent to the tenant setting forth the full amount of those charges together with a demand for timely payment. Accordingly, those charges were waived and cannot be retroactively claimed.

The second counterclaim in the amended answer in the first action sought 11.2% of all real property taxes for the shopping center together with attorney's fees for attempting to collect same. Paragraph 28 of the subject lease reads,

The Tenant shall pay to the Landlord as additional rent hereunder 11.2% of the total annual real property taxes for the entire building and premises known as Monarch Center of which the Demised Premises are a part within 15 days after each half of said tax becomes due and payable to the proper taxing authority or fifteen (15) days from date of receipt by Tenant of a copy of the tax bill, whichever date is later. Any such taxes payable by Tenant to Landlord pursuant hereto shall be deemed added rent collectible by summary proceeding or otherwise at the option of the Landlord. In the event of commencement of any legal proceeding to collect the same, the Landlord shall be entitled to legal fees..."

The waiver noted above concerning the common charges as additional rent extended to the real estate taxes, and same are not now recoverable retroactively. In further support of this conclusion, the court notes that there was no testimony that copies of the relevant bills were ever delivered to the Tenant during the years at issue placing Tenant on notice of the amount due, nor was there testimony of any demands for payment each half year as each half of said tax became due and payable as contemplated by the above noted lease provision. Finally, the only tax bills offered and received in evidence at the trial were for 1993/94 (Defendant's GGG) and 2006/2007 (Defendant's HHH). Even if liability had been established, damages would have been impossible to accurately quantify.

The third counterclaim in the amended answer in the first action sought to hold the Tenant liable for Landlord's tax bills for waste disposal. There was no testimony during the trial about waste disposal bills, on the tax bill or otherwise, and an examination of the aforementioned tax bills from 1993/94 and 2006/07 reveals no separate charges or even any reference to waste disposal. Simply put, there was no evidence adduced to support this counterclaim.

The fourth counterclaim in the amended answer in the first action sought to hold the Tenant liable for the cost of water used at the demised premises. In one of the very few facts not in dispute in the case, both sides agree that there was no separate water meter for plaintiff's store. Apparently the entire shopping center was on the same meter. As there was absolutely no testimony, expert or otherwise, concerning how much water the plaintiff used or could be expected to use, there is no way that defendant could prevail on this claim. The court does not reach the issue of whether or not plaintiff was responsible inasmuch as that determination is not necessary.

The fifth counterclaim in the amended answer in the first action attempted to hold the Tenant responsible for the landlord's cost of snow removal in front of tenant's store. For the same reason that the first and second counterclaim must fail, so must this one. The testimony of defendant's principal was that these charges were waived unless the tenant sold/assigned the lease to anybody outside tenant's immediate family. They cannot be retroactively resurrected.

The second action was commenced against the corporate landlord and its principal individually, and contained six causes of action. The answer contains five counterclaims. By prior decision of the court dated March 7, 2006 (Jones, J.), the claims asserted by the plaintiff against the individual defendant were dismissed, but his individual counterclaim apparently survived.

The first cause of action in this second action is entitled "for fraud and misrepresentations..." The essential constituents of such a cause of action are a representation of a material fact, falsity, scienter, reliance, and injury or damage. (*60A N.Y. Jur. 2d Fraud and Deceit § 14*) Notwithstanding that counsel chose to entitle this cause of action "for fraud and misrepresentations," there was a complete failure to plead the cause of action with the requisite specificity. The thirty-four paragraphs setting forth the alleged cause of action are essentially incomprehensible. Even if there had been credible evidence of all the allegations contained therein, it would be impossible to conclude that a cause of action in fraud and misrepresentations had been established.

The second cause of action in the second action is styled "prima facie tort." An "action to recover damage for a 'prima facie tort' is, in effect, an action on the case, and damage is a necessary element of such a cause of action." (*Brandt v. Winchell, 283 A.D. 338, 342 [1st Dept, 1954]*) As noted in one of the causes of action in the first case, the books and records of the plaintiff such as they were, coupled with the absolutely incredible testimony of the plaintiff's accountant and plaintiff's president on the issue of employee compensation and tax status would have rendered any award of damages entirely speculative with no basis in the evidence at all. As such no finding on the issue of liability is necessary.

The third cause of action in the second action is entitled "for pursuit of negotiations in bad faith and for breach of agreement to release claims." This court is unaware of any cognizable cause of action in New York under this theory, and accordingly will not consider same. It appears to restate various allegations contained under other causes of action with the same alleged damages.

The fourth cause of action in the second action is for wrongful interference with plaintiff's actual or prospective business relations with its past and prospective customers. Although pled in almost incomprehensible language, the allegations as set forth in the complaint were not proved by a fair preponderance of the credible evidence.

The fifth cause of action (actually numbered as another fourth cause in the complaint) in the second action is "for breach of a promise repair(sic), for damages from negligent repairs and for failure to provide adequate security." This cause of action is pled in incomprehensible language and will not be considered by the court.

The sixth cause of action (numbered as the fifth cause in the complaint) is "for injunctive relief." The plaintiff has not established its entitlement to any of the requested relief sought therein. The court declines to issue any injunctive relief.

Turning to a consideration of the counterclaims in the second action, the first is "for tort for property damage to the roof and landlord's cesspool system." Inasmuch as there was no proof of the amount of damages concerning the roof and no proof that the plaintiff "intentionally clogged the plumbing of the landlord by releasing grease into it" as alleged in the complaint, there can be no recovery by the defendant.

The second counterclaim in the second action is "for negligence for improperly altering the roof." Again, there was no proof of the amount of damages concerning the roof. There is then an allegation that the plaintiff negligently released grease into the landlord's septic/cesspool system. However, inasmuch as there was no evidence to support any finding by the court that any such negligence, even if established, was the proximate cause of any injury to the landlord, there can be no recovery by the defendant.

The third counterclaim in the second action is "for breach of contract for failure to pay for water used." This is identical to the fourth counterclaim in the amended answer in the first action, and for the identical reasons noted above there can be no recovery by the defendant.

The fourth counterclaim in the second action is for defamation of character. Apparently statements are attributed to both plaintiff's president, Martin Rubinstein, and plaintiff's attorney. At the outset it must be noted that plaintiff's attorney is not a party to the action, and accordingly no counterclaim for any statements made by plaintiff's attorney can be entertained. Proceeding on those statements directly attributed to Martin Rubinstein the second problem with the pleading is exposed. At the time of the interposition of the answer there were two named defendants, Monarch Holding Corporation (the owner of the property and therefore the landlord) and Louis Chrisomalis (president of the corporate

owner). As noted above, during the pendency of the action by prior decision of the court dated March 7, 2006 (Jones, J.), the claims asserted by the plaintiff against the individual defendant were dismissed, but his individual counterclaim apparently survived. The counterclaim is pled so as to interchange “Chrisomalis” (or the pronouns ‘him’ and ‘his’) and “landlord.” Apparently some statements allegedly defamed the corporate landlord and some allegedly defamed the individual Chrisomalis. Inasmuch as the only proof of the exact statements as alleged in the complaint was evidence that Rubinstein called Chrisomalis an “anti-Semite” and a “slumlord,” and there was no real proof on the issue of damages, the court declines to make an award under this counterclaim.

The fifth counterclaim (numbered as the sixth counterclaim in the answer) in the second action is “for tortious interference with defendant’s actual or prospective business relations with its past and prospective customers.” There was no testimony by any of the defendant’s past customers (tenants) that there had been any negative effects on their actual business relationship with defendant based upon any alleged interference by plaintiff. In fact they had nothing but good things to say about their business relationship with defendant. There was no damage established. And the only prospective business relationship testified to was Chrisomalis’ testimony about a prospective tenant that backed out of a tenancy with only speculation as to why that prospective tenant chose not rent from defendant. Accordingly this counterclaim must fail.

Finally the court denies all claims for costs and sanctions including attorneys’ fees based on allegations of frivolous conduct under NYCRR Part 130 Rules of the Chief Administrator. In pertinent part the rules provide:

“.....Conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

3) it asserts material factual statements that are false.” [22 NYCRR 130-1.1(c)]

The court cannot say that the conduct in this case, taken as a whole, was completely without merit in law, nor that it was undertaken “*primarily*”(emphasis added) to delay or prolong the resolution of the litigation...., nor that it asserted material factual statements that were false.

What the court can say is that good motion practice under CPLR § 3211(7) would have resulted in either a narrowing of the issues for consideration, or pleadings constructed with greater clarity. And good trial practice would have substantially reduced the length of the trial. Finally, boorish and abusive behavior between attorneys never furthers the goal of reasoned discourse between adversaries. It has no place in the practice of law.

Submit judgment.



J.S.C.