

E.F.L. Baking Corp. v Lowy Family Irrevocable Trust
2007 NY Slip Op 34101(U)
December 11, 2007
Supreme Court, Nassau County
Docket Number: 0188-05/
Judge: Leonard B. Austin
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INDEX
No. 10188-05

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 8-1-07

Submission Date: 8-3-07

Motion Sequence No.: 003/ MOT D

_____ x
E.F.L. BAKING CORP.,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF

Garry & Garry, LLC

115 Broadway - 3rd Floor

New York, New York 10006

LOWY FAMILY IRREVOCABLE TRUST,
MEYER LOWY a/k/a MICHAEL LOWY,
and KATY LOWY,

Defendants.

COUNSEL FOR DEFENDANT

Jonathan A. Stein, P.C.

132 Spruce Street

Cedarhurst, New York 11516

ORDER

The following papers were read on a Defendants' motion for leave to serve an amended answer:

Notice of Motion dated July 18, 2007;

Affidavit of Allen M. Lowy sworn to on July 18, 2007;

Affirmation of Ira Greene, Esq. dated August 1, 2007;

Affirmation of Jonathan A. Stein, Esq. dated August 6, 2007.

Defendants move for leave to serve an amended answer to assert additional counterclaims.

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DISCUSSION

By lease dated October 31, 2001 (the "Lease"), Defendants Meyer Lowy a/k/a Michael Lowy and Kay Lowy leased the ground floor and basement of premises 1373 Coney Island Avenue, Brooklyn, New York (the "Premises") to Plaintiff E.F.L. Baking Corp. ("EFL"). EFL operates a bakery at the Premises.

The Lease gave EFL the option to purchase the premises and a right of first refusal regarding the leasing of any space at the Premises that were not subject to the Lease.

At some point, title to the property was transferred to The Lowy Family Irrevocable Trust ("Trust") and the Lease was assigned to the Trust.

EFL claimed it exercised its option to purchase the premises. The trust asserted that EFL did not properly exercise the option to purchase and refused to convey the Premises to EFL.

EFL also claimed that the Trust rented Units 1A and 2A at the premises in violation of EFL's right of first refusal.

EFL commenced this action seeking specific performance of the option to purchase and money damages for the Trust's leasing the Units 1A and 2A without offering EFL the right of first refusal.

After discovery was completed, the parties agreed to submit the matter to the Court for decision on Stipulated Facts. By decision and order dated October 31, 2006, this Court held that EFL had not properly exercised its option to purchase and

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dismissed its cause of action for specific performance. The Court further held that the Trust violated EFL's right of first refusal when it leased Units 1A and 2A without giving EFL the right to exercise its right of first refusal. The Court set the matter down for a hearing to determine the damages EFL sustained as a result thereof. The damage hearing has not yet been held.

On or about July 18, 2005, Trust caused a Notice of Termination dated July 15, 2005 ("July Notice") to be served upon EFL. The July Notice indicated that the Lease was being terminated because EFL had failed to pay rent and additional rent as required thereunder, had failed to pay its *pro rata* share of the insurance on the Premises as required by Paragraph 52 of the Lease, had failed to pay its agreed upon share of the real estate taxes due on the property and had failed to provide the Trust with a certificate of insurance indicating that it had obtained a fire and hazard insurance policy naming the landlord as an additional named insured on the policy. The July Notice demanded the tenant to deliver possession of the premises to the landlord on or before July 29, 2005. If EFL did not delivery possession by that date, Trust would commence a proceeding in the appropriate court to recover possession of the premises.

EFL did not comply with the July Notice. EFL claimed it was no longer subject to the terms of the lease because upon the exercise of its option to purchase it became a vendee in possession.

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The pertinent part of Paragraph 17(1) of the Lease states:

“If Tenant defaults in fulfilling any of the covenants of this lease, including, without limitations the covenants for the payment of rent and additional rent... Upon the Landlord serving a written five (5) day notice specifying the nature of default, the lease will be terminated and cancelled, without the right or ability to cure, and thereafter this lease and the term thereunder shall end and expire as though the end of the five day term was the end of the term specified in the lease.”

In view of this Court's October 31, 2006 decision and order, EFL's position that it was a vendee in possession is no longer viable.

The Trust seeks to amend its answer to allege a counterclaim seeking a declaratory judgment that the July Notice was effective to terminate the Lease. Based upon such a determination, the Trust seeks a judgment of possession and the issuance of a warrant of eviction.

Trust further wants to amend its answer to assert a counterclaim awarding its fair use and occupancy from of the demised premises from the date of the termination of the lease through the date upon which it recovers possession of the premises.

DISCUSSION

“Leave to serve amended pleadings ‘shall be freely given’ absent prejudice and surprise resulting from the delay. (CPLR 3025[b]; see *Fahey v. County of Ontario*, 44 N.Y.2d 934; *Faracy v. McGraw Edison Corp.* 229 A.D.2D 463)” *Northbay Construction Co., Inc. v. Bauco Construction Corp.*, 275 A.D.2d 310, 311 (2nd Dept. 2000); see also

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Nikac v. Rujak, 276 A.D.2d 443 (2nd Dept. 2000) and Goldstein v. St. John's Episcopal Hosp., 267 A.D.2d 426 (2nd Dept. 1999).

The determination of whether to deny or permit an amendment is entrusted to the sound discretion of the court. See, Liendo v. Long Island Jewish Med. Ctr., 273 A.D.2d 445 (2nd Dept. 2000); and Henderson v. Gulati, 270 A.D.2d 308 (2nd Dept. 2000)

The party seeking leave to serve an amended pleading must make an evidentiary showing that the proposed amendment has merit. Ruffing v. Union Carbide Corp., 308 A.D.2d 526 (2nd Dept. 2003); Mohan v. Hollander, 303 A.D.2d 473 (2nd Dept. 2003); and Curran v. Auto Lab Service Center, Inc., 280 A.D.2d 636 (2nd Dept. 2001).

Mere lateness of the proposed amendment is not a barrier to the service of an amended pleading. The party opposing the proposed amendment must demonstrate that significant prejudice will result if the party is permitted to serve an amended pleading. Edenwald Contracting Co., Inc v. City of New York, 60 N.Y.2d 957 (1983); and O'Neal v. Cohen, 186 A.D.2d 639 (2nd Dept. 1992). Prejudice occurs when the party opposing the amendment has been "...hindered in the preparation of their case or prevented from demonstrating the merits of their position." First National Bank of Hudson Valley v. Schantz, 253 A.D.2d 735, 736 (2nd Dept. 1998).

The proposed amendment is supported by the documentary evidence; to wit: the Lease and the July Notice.

EFL asserts that leave to amend the answer to assert these counterclaims at this late date is prejudicial. It further asserts that the proper means for the Trust to recover

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possession of the Premises and use and occupancy is in a summary holdover proceeding to be commenced in Civil Court, Kings County.

To defeat a motion for leave to serve an amended pleading, the party opposing the amendment must demonstrate ... "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one now wants to add." Siegel, *New York Practice* 4th § 237. See also, Fulford v. Baker Perkins, Inc., 100 A.D.2d 861 (2nd Dept. 1984); and Wyso v. City of New York, 91 A.D.2d 661 (2nd Dept. 1982).

EFL's opposition to the motion does not establish that it will sustain any prejudice if the motion to amend is granted. EFL's opposition essentially concedes that the Trust has the right to assert these counterclaims but urges that they should be prosecuted in a different forum. Such argument is contrary to the notion of judicial economy.

Requiring the Trust to do this would unnecessarily and delay the resolution of the disputes existing between the parties arising out of the Lease.

Accordingly, it is,

ORDERED, that Defendants' motion for leave to serve an amended answer is **granted**; and it is further,

ORDERED, that the amended answer as contained in Exhibit F of Defendants' motion papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further,

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ORDERED, that counsel for the parties are directed to appear for a status conference on January 17, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 11, 2007



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED
DEC 13 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE