

Peach Parking Corp. v 346 West 40th Street LLC

2007 NY Slip Op 34353(U)

October 9, 2007

Supreme Court, New York County

Docket Number: 0103096/2004

Judge: Walter Tolub

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

PRESENT: TOLUB
Justice

PART 15

PETRAH PARKING CORP
- v -
346 WEST 40ST

INDEX NO. 103096/07
MOTION DATE _____
MOTION SEQ. NO. 13
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied in accordance with the accompanying memoranda opinion.

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

FILED
OCT 12 2007
NEW YORK
COUNTY CLERK

Dated: 10/9/07 _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
PEACH PARKING CORP.,

Plaintiff,

-against-

346 WEST 40TH STREET LLC, KINNEY PARKING
SYSTEMS, INC., and the HERTZ CORPORATION,

Defendants.

-----x

Index No. 103096/04
Mtn Seq. 013

FILED
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COUNTY OF NEW YORK

WALTER B. TOLUB, J.:

This action arises out a parking garage in Manhattan which has clearly fallen into disrepair ("the parking garage"), a prime lease, sublease, and sub-sublease for the parking garage, and a question as to who is responsible for paying for the completion of necessary repairs to this property.

The parking garage, located in a rather lucrative location on this island, is presently owned by defendant West 40th Street, LLC ("West 40th"). In 1978, defendant West 40th leased the parking garage ("the prime lease") to defendant Kinney Systems, Inc. ("Kinney"). Under the prime lease, Kinney, who accepted the premises "as is", was obligated to keep the premises in good condition and make all structural and non-structural repairs to the premises. The 1978 prime lease capped Kinney's expenditures to keep the premises in good repair at \$50,000.

In addition, the prime lease included two renewal options for the property. The first option was exercised. The second

option, exercisable in 2007, would extend the lease term until 2013.

Kinney never occupied the premises. One month after executing the prime lease, Kinney subleased the premises to plaintiff Peach Parking Corporation ("Peach Parking"). Peach Parking occupied the premises from March, 1978 until November 26, 2001, at which time it subleased the building (the sub-sublease) to defendant Hertz Corporation ("Hertz"). Hertz occupied the premises beginning in March, 2002, but asserts that it was never able to occupy the entire space, because of the existence of what it claimed were dangerous conditions.

Two years after subleasing the garage to Hertz, Peach Parking commenced this action seeking a declaration that it is not responsible for any repairs to the property. Discovery and substantial motion practice ensued and on March 30, 2006 plaintiff filed its Note of Issue and Certificate of Readiness. Hertz vacated the garage on June 30, 2006.

By this motion, plaintiff seeks leave to amend¹ its complaint pursuant to CPLR 3025(b) so as to assert three additional causes of action against defendants. Defendant Hertz cross-moves for an order granting leave to interpose a counterclaim and affirmative defense of constructive eviction in

¹The court is well aware that plaintiff refers to this as a "supplement" to its original complaint.

the event that plaintiff's motion to amend is granted. Lastly, defendant Kinney cross-moves for an order granting costs and fees for frivolous motion practice.

As a preliminary matter, the court notes that in July of 2006, defendant Hertz unsuccessfully attempted to vacate the Note of Issue in this matter. Hertz' motion was predicated upon the contention that a May, 2006 structural engineering report constituted new findings warranting additional discovery. Peach Parking, in opposition took the position that the motion was made "in order to delay the trial, and for no other purpose" (Hertz' Affirmation in Opposition, Exhibit C). More significantly, Peach Parking also made the assertion that it was not seeking a judgment for outstanding rent from Hertz (id).

The motion before this court makes it abundantly clear that plaintiff has changed its position. The three new causes of action, made in a motion conveniently timed to delay an inevitable trial, seek damages for repairs from defendants West 40th and Kinney (the proposed fourth and fifth causes of action) and seeks outstanding and additional rent from Hertz from July 1, 2006.²

Inasmuch as plaintiff's proposed fourth and fifth causes of action only seek damages from Kinney and West 40th, and since

² The proposed sixth cause of action also charges that Hertz failed to carry general liability and property insurance in the period subsequent to July 1, 2006.

based on the earlier complaint and allegations made in prior motion practice, the addition of these claims for damages neither surprise nor prejudice the parties, in accordance with CPLR 3025(b), the fourth and fifth causes of action may be added.

The portion of the motion seeking to add the sixth cause of action is also granted, as is the cross-motion made by defendant Hertz to interpose a counterclaim and affirmative defense of constructive eviction. Contrary to plaintiff's assertions, all earlier decisions by this court which denied Hertz the opportunity to advance a claim of constructive eviction were made because in the earlier motions, Hertz was seeking to add a claim of constructive eviction as affirmative relief, and was not using the claim defensively. Since plaintiff has now decided to pursue a claim of nonpayment of rent against Hertz, Hertz is now entitled to assert any valid counterclaims and affirmative defenses it has to this allegation.

The remaining cross-motion is denied in its entirety.

Accordingly, it is

ORDERED that plaintiff's motion to amend the complaint so as to assert the newly asserted fourth, fifth, and sixth causes of action is granted; and it is further

ORDERED that the amended complaint, upon service of a copy of this order with notice of entry, shall be deemed served; and it is further

ORDERED that the cross-motion advanced by defendant Hertz Corporation for leave to interpose a counterclaim and affirmative defense of constructive eviction is granted; and it is further

ORDERED that said defendant Hertz Corporation shall serve the aforementioned counterclaim and affirmative defense 45 days of service of a copy of this order with notice of entry; and it is further


ORDERED that the cross-motion of defendant Kinney Parking Systems, Inc. for an order granting costs and fees for frivolous motion practice is denied.

Counsel shall appear for a Pre-Trial conference in this matter in IA Part 15, Room 335, 60 Centre Street, New York, New York, at 11:00 a.m. on December 14, 2007 at which point this matter will be given a final date for trial.

FILED
OCT 12 2007
NEW YORK
COUNTY CLERK

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/9/07



HON. WALTER B. TOLUB, J.S.C.