Jack Vogel Assoc. v Color Edge Inc.
2008 NY Slip Op 31509(U)
May 29, 2008
Supreme Court, New York County
Docket Number: 0113874/2006
Judge: Walter B. Tolub
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SCANNED ON 6/3/2008

[* 1]

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

PRESENT: ______________________ Justice

PART 15

Jack Vogel

INDEX NO. 113874/06

MOTION DATE

- v -

MOTION SEQ. NO. 02

Color Edge

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/22/08

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART 15

JACK VOGEL ASSOCIATES,

Plaintiff,

-against-

Index No.: 113874/06

COLOR EDGE INC. and MERISEL INC.,

Defendants.

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

TOLUB, J.:

Plaintiff Jack Vogel Associates (JVA) is the former landlord of defendants Color Edge Inc. (Color Edge) and Merisel Inc. (Merisel). JVA's complaint asserts four causes of action against the defendants: (1) rents allegedly owed by Color Edge for the premises leased by Color Edge (eighth and eleventh floors of plaintiff's building) in the amount of $72,871.90; (2) rents allegedly owed by Merisel for the premises leased by Merisel (ground and basement levels of the building) in the amount of $32,900; (3) property damage allegedly caused by defendants to the building's waste and sewer line in the amount of $13,800; and (4) payment by defendants of legal fees incurred by plaintiff in an amount not less than $20,000.

In their answers, defendants assert various affirmative defenses, as discussed fully below. JVA moves to strike all affirmative defenses, and for leave to amend the third cause of action for alleged property damage from $13,800 to $79,800.

Color Edge opposes the motion to strike and asserts a right of setoff, alleging, among other things, that JVA failed to maintain the building. Merisel also opposes the motion to strike (in part, as discussed below), and cross-moves for summary judgment dismissing the second cause of action for alleged unpaid rents.

Background

Based on the record of this case, the subject building is owned by JVA, and is located at 38 West 21st Street, New York City. On or about December 1, 2002, JVA entered into three lease agreements with Color Edge for (1) the eighth floor; (2) the eleventh floor; and (3) the ground and basement levels of the building. In March 2005, Merisel acquired Color Edge's assets, including its trade name, and in conjunction therewith, Merisel entered into a Modification, Assignment and Assumption of Lease Agreement (the Assignment) with Color Edge and JVA, with respect to the ground and basement floors of the building. Pursuant to the Assignment, Merisel assumed Color Edge's rent obligations, on a going-forward basis, with respect to the ground and basement floors. With respect to the eighth and eleventh floors, Merisel asserts that, based on the sublease agreements between it and Color Edge, the rent obligations as to these floors remained the sole responsibility of Color Edge.

In its complaint, JVA alleges that Color Edge breached (1) the eighth floor lease by vacating the premises on or about

June 20, 2005 without paying rents; and (2) the eleventh floor lease by vacating the premises on or about July 2, 2005 without paying rents. JVA also alleges that Merisel breached the ground and basement lease (i.e. the Assignment) by vacating the premises on or about March 2006 without paying rents. Complaint, ¶¶ 8-11.

Color Edge asserts five affirmative defenses in its answer: (1) the complaint fails to state a cause of action; (2) the court lacks subject matter jurisdiction over this action; (3) this action is barred by the statute of limitations; (4) this action is barred by the statute of frauds; and (5) JVA breached the leases by failing to maintain the building, including the elevators, and Color Edge holds a right of setoff or counterclaim against JVA. On the other hand, Merisel asserts the following defenses: (a) the action is barred by the statue of frauds; (b) the complaint fails to state a cause of action; (c) the action is barred by wavier and release; (d) the action is barred by accord and satisfaction; (e) Merisel reserves the rights to add other affirmative defenses; and (f) Merisel incorporates by reference all applicable affirmative defenses of Color Edge.

Subsequent to defendants' interposition of answers and assertion of affirmative defenses therein, JVA moves to strike all affirmative defenses. The motion to strike is opposed by both defendants; Merisel also seeks a summary judgment dismissing JVA's second cause of action. In reply, JVA requests that the

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court grant the motion to strike in its entirety, and deny Merisel's cross motion. To this date, none of the parties have demanded a bill of particulars pursuant to CPLR 3042, moved for a more definite statement pursuant to CPLR 3024 (a), or conducted disclosure pursuant to Article 31 of the CPLR.

Discussion

I. Motion To Amend Complaint

JVA seeks leave of court, pursuant to CPLR 3025 (b), to amend the complaint's third cause of action, i.e. the property damage claim relating to the building's waste and sewer lines, from $13,8000 to $79,800, an increase of $66,000 in claim amount. Both Color Edge and Merisel do not oppose the motion to amend.

Accordingly, the relief requested by JVA is granted, without prejudice to the rights of defendants to file a responsive pleading to the complaint, as amended.

II. Motion To Strike Affirmative Defenses

JVA argues that all of defendants' affirmative defenses asserted in their answers should be stricken because the answers were unverified. Relying on CPLR 3020 (c), which states that "a defense which does not involve the merits of the action shall be verified," JVA contends that all affirmative defenses contained in the unverified answers are legally insufficient.

This argument is flawed. First, without identifying a specific affirmative defense or citing to any caselaw with

respect to such defense, JVA argues in a conclusory manner that the affirmative defenses "do not involve merits of the action." Notably, the CPLR mandates verification in limited circumstances. For example, verification is required under CPLR 3020 (b) (1) when the complaint charges a defendant with having confessed a judgment or defrauded creditors; CPLR 3020 (b) (2) requires verification if a corporate defendant is sued on a promissory note; and CPLR 7804 (d) requires verification of all pleadings in an Article 78 proceeding. (*See generally* Siegel, NY Practice, § 232 at 389 [4th ed 2005][analyzing various CPLR provisions and caselaw and concluding that verification is optional, except in certain limited instances]).

More importantly, CPLR 3022 states that when a pleading is unverified or defectively verified, the party who is entitled to a verified pleading must give notice "with due diligence to the attorney of the adverse party" that he elects to treat the unverified pleading as a nullity. While courts under specific circumstances (such as in election cases) have interpreted "due diligence" to mean "immediately" or "within twenty-four hours," (*Ladore v Mayor & Board of Trustees of Village of Port Chester*, 70 AD2d 603, 604 [2d Dept 1979]), the Court of Appeals has not specified a uniform time period by which to measure "due diligence". (CPLR 3022; *Lepkowski v State* , 1 NY3d 201, 210 [2003]). However, it is generally held that a party must show

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that its "substantial right" is "prejudiced" by the defective or unverified pleading. (*See e.g.* *Master v Pohanka*, 44 AD3d 1050, 1052 [2nd Dept 2007]; CPLR 3026 [pleading defects shall be ignored if a "substantial right of a party is not prejudiced"]). Further, the Court of Appeals stated in *Lepkowski* that a party who "does not notify the adverse party's attorney with due diligence waives any objection to an absent or defective verification." (1 NY3d at 210).

In the instant case, the answers were served by Merisel and Color Edge on or about December 8, 2006 and January 12, 2007, respectively. JVA's motion to strike was not filed until May 29, 2007, and it was the only notice that JVA gave with respect to its intent to treat the unverified answers as a nullity. Based on these facts, JVA did not act with "due diligence" in notifying defendants as to its intention or position. Having failed to act diligently, JVA can be deemed to have waived any objection to non-verification. In any event, JVA does not argue (nor has it shown) that its substantial right is prejudiced due to the lack of verification. Accordingly, defendants' affirmative defenses should not be stricken simply because they are asserted in unverified answers.

Burden Of Proof With Respect To Affirmative Defenses

With respect to affirmative defenses, CPLR 3018 (b) provides that a party "shall plead all matters which if not

pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading ... ." Thus, it is well-settled that an affirmative defense is intended to define issues, and give notice to the other party to insure that such party will not be taken by surprise at trial, if such defense is not pleaded. It is also black-letter law that the party asserting an affirmative defense (typically the defendant) has the burden of proof with respect thereto, *Latha Restaurant Corp. v Tower Insurance Co.*, 285 AD2d 437 [1st Dept 2001], and that on a motion to strike the defense pursuant to CPLR 3211 (b), the "defendant is entitled to all reasonable inferences to be drawn from the submitted proof,". (*Capital Telephone Co. v Motorola Communications and Electronics, Inc.*, 208 AD2d 1150, 1150 [3d Dept 1994]; *Accord* *Robbins v Growney*, 229 AD2d 356, 357 [1st Dept 1996][bare legal conclusions unsupported by facts or submitted proofs are insufficient to raise affirmative defenses]). Further, CPLR 3013 provides, in relevant part, that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions ... intended to be proved and the material elements of each cause of action or defense."

A. The Affirmative Defenses Of Color Edge

Before addressing its affirmative defenses, Color Edge argues that JVA's motion to strike is premature because JVA also

seeks to amend its complaint at the same time. Such argument is without merit, because courts have granted motions that sought to both amend complaints and strike affirmative defenses. (*See e.g.*, Blaier v Cramer, 303 AD2d 301 [1st Dept 2003]; Tucker v Leak, 268 Ad2d 320 [1st Dept 2000]). In any event, JVA only seeks leave to amend the third cause of action of its complaint, which does not have an impact upon, or is otherwise applicable to, all of Color Edge's affirmative defenses, as discussed below.

The First Affirmative Defense

In its answer, Color Edge's first affirmative defense asserts that "the complaint fails to state a claim upon which relief can be granted." In the Appellate Division of the First Department, the inclusion of this defense in an answer is deemed surplusage and harmless, and "should not be subject to a motion to strike or provide a basis to test the sufficiency of the complaint." (Riland v Todman & Co., 56 AD2d 350, 351 [1st Dept 1977]; Bernstein v Freudman, 136 AD2d 490, 492-493 [1st Dept 1988] [noting this defense is "mere surplusage," but since another cause of action can remain, such defense "can also remain"]). Because of binding precedents, JVA"s motion to strike this affirmative defense is denied.

The Second Affirmative Defense

The second affirmative defense asserts that this court "lacks jurisdiction over the subject matter of this action."

Although this defense is non-waivable and can be raised at any stage of the litigation, *Gelin v Lehman College*, [254 AD2d 119 [1st Dept 1998], in the face of a motion to strike such defense, Color Edge has failed to state any reason to support the validity of its assertion. Accordingly, the motion to strike this defense is granted.

The Third Affirmative Defense

Color Edge asserts that this action is barred by the statute of limitations. Specifically, Color Edge argues, in its opposition to the motion to strike, that because the complaint's third cause of action (damages allegedly caused by the defendants to the building's waste line piping) fails to indicate when the alleged damage occurred, Color Edge cannot determine when the statute of limitations began to run.

JVA counters that the alleged damage occurred in 2005, and submits invoices of the plumbing company B&H Piping and Heating (attached as Exhibit G to Gregory Lansky's Affirmation in support of JVA's motion to strike), which purport to show that intended repairs for the damaged piping were to be made in 2005. In such regard, JVA asserts that this action is timely because it is commenced within the six year limitation period of CPLR 213.

Color Edge does not contest the authenticity of the invoices, and has not identified a specific statutory section as the applicable period of limitations. Yet, Color Edge argues

that it is not required to identify the statutory section under *Immediate v St. John's Queens Hospital*, [48 NY2d 671 [1979]. Color Edge's reliance on *Immediate* is misplaced. In that case, it was conceded that plaintiff's medical malpractice action was not timely commenced within the statutory period, and that plaintiff failed to assert a claim of fraudulent concealment of the alleged malpractice. Thus, the *Immediate* court ruled that plaintiff's contention that the defendant insufficiently pleaded the statue of limitation defense was without merit, and that the defendant was not required to specifically identify the statutory section as an affirmative defense. (*Id.* 48 NY2d 672-673).

In light of the foregoing, the asserted statute of limitations defense is conclusory, particularly when Color Edge fails to submit any proof to contradict those proofs submitted by JVA. (*Glenesk v Guidance Realty Corp.*, 36 AD2d 852, 853 [2nd Dept 1971]; ["[d]efenses which merely plead conclusions of law without supporting facts are insufficient"]). Accordingly, the motion to strike this affirmative defense is granted.

The Fourth Affirmative Defense

Color Edge asserts, as its fourth affirmative defense, that the instant action is barred by the statute of frauds. This defense is inapplicable to the facts of this case or is otherwise without merit. Color Edge does not dispute that JVA's causes of action are based on written contracts (i.e. the leases) entered

into by the parties and Color Edge has obligations thereunder. In such regard, Color Edge's conclusory assertion, without any substantive or evidentiary support, fails to provide factual or legal basis for this affirmative defense. Accordingly, the motion to strike this defense is granted.

The Fifth Affirmative Defense

As its fifth affirmative defense, Color Edge alleges that JVA, as owner of the building, breached its contractual duties to properly maintain the building and the elevators, which allegedly resulted in Color Edge's loss of customers, business and revenue. In addition, Color Edge alleges that it has paid JVA $200,000 in satisfaction of all claims of JVA, and that JVA failed to return to Color Edge the $67,568 security deposit when it vacated the leased premises. Thus, Color Edge asserts that it has a right of setoff or counterclaim against JVA, in the event of an adverse finding against Color Edge.

JVA disputes Color Edge's allegations, and counters that Color Edge is not entitled to setoff or reduction in rent under paragraphs 4 and 38 of the lease agreements. JVA, however, does not state whether the lease agreements prohibit Color Edge from suing JVA for breach of contract, or otherwise from asserting a counterclaim or setoff when JVA seeks recovery against Color Edge for alleged damage to the building caused by Color Edge. In light of the foregoing, JVA's motion to strike

the fifth affirmative defense is denied.

B. The Affirmative Defenses Of Merisel

Like Color Edge, Merisel also opposes JVA's argument that the affirmative defenses contained in Merisel's answer should be treated a nullity because the answer was not verified. For the reasons stated above, the defenses should not be stricken simply because they are asserted in an unverified answer.

The First And Second Affirmative Defenses

With respect to its first affirmative defense (statute of frauds) and second affirmative defense (failure to state a cause of action), Merisel does not oppose the striking of such defenses. Accordingly, JVA's motion seeking to strike the first and second affirmative defenses of Merisel is granted.

The Third And Fourth Affirmative Defenses; Cross Motion For Summary Judgment Dismissing The Second Cause Of Action

With respect to its rent obligations, Merisel's interposes "waiver and release" and "accord and satisfaction" as its third and fourth affirmative defenses, respectively. In support thereof, Merisel assert that (1) by letter dated February 1, 2006, JVA unilaterally and retroactively increased Merisel's rent for the leased premises from $17,499 to $32,500 per month; (2) Merisel issued a check to JVA in February 2006 for the increased amount, which was far greater than the amounts that Merisel had customarily paid JVA; (3) the check was negotiated by JVA; and (4) it was Merisel's understanding that this check would

fully satisfy any outstanding amounts claimed by JVA. These assertions are supported by JVA's February 1, 2006 letter as well as various bank statements and negotiated checks, copies of which are annexed as Exhibits C, D and E to the Affidavit of Danny Lanjewar in support of Merisel's opposition to the motion to strike (the Lanjewar Affidavit).

JVA does not dispute, nor has it submitted contrary evidence, that it had negotiated the check and Merisel had fully paid its rents through and including February 2006. "As a general rule, acceptance of a check in full settlement of a disputed unliquidated claim operates as an accord and satisfaction discharging the claim." (*Merrill Lynch Realty, Carll Burr, Inc. v Skinner*, 63 NY2d 590, 596 [1984]). Moreover, waiver or release "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage." *General Motors Acceptance Corp. v Clifton-Fine Central School District*, 85 NY2d 232, 236 [1995]). Therefore, the defenses of "accord and satisfaction" and "waiver and release" are available or applicable to Merisel with respect to its rent obligations prior to and including February 2006, particularly when JVA had negotiated the check without protest, and JVA does not now, in its reply, assert that Merisel owes any

unpaid rent prior to and including February 2006.[1] Accordingly, JVA's motion to strike the third and fourth affirmative defenses is denied, with respect to any claim that Merisel owes unpaid rent for the periods prior to and including February 2006.

However, these defenses do not apply to JVA's claim that Merisel allegedly owes unpaid rent with respect to March 2006 or other non-rent obligations under the lease, such as property damage claims. More specifically, in its reply, JVA alleges that Merisel was in possession of the leased premises in March 2006, and thus still owes JVA rent for that month, in an amount of $32,900, consisting of $32,500 in base rent, plus $400 of additional rent in the form of water-sewer charges and fines. This amount is what JVA seeks to recover in its second cause of action against Merisel.

In opposition to JVA's allegation and in support of its cross motion for summary judgment dismissing the second cause of action, Merisel asserts, by way of the Lanjewar Affidavit, that it vacated the premises on February 28, 2006, and that this date should be contrasted with JVA's general allegation that Merisel vacated the premises some time in March 2006.[2] Merisel also

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[1] Notably, the complaint on its face does not state whether the second cause of action alleging unpaid rents included rents for the periods prior to and including February 2006.

[2] The complaint alleges that "on [sic] or about March 2006," Merisel "breached the [lease agreement] by vacating the ground floor store and basement in violation of the said agreement

contends that because JVA failed to submit any documentary evidence for the unpaid rent claim, such as a contemporaneous invoice or letter demanding payment of the March 2006 rent, summary judgment dismissing such claim should be granted.

In considering a motion for summary judgment, the Court of Appeals has stated, in _Alvarez v Prospect Hospital_, 68 NY2d 320, 324 [1986], the following:

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the above guidance, the courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. (_Giandana v Providence Rest Nursing Home_, 32 AD3d 126, 148 [1st Dept 2006];[because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to

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without paying rent and additional rent ... ." *Id.* para. 10.

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the absence of triable issues"][citations omitted]; *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997](on a summary judgment motion, "evidence should be analyzed in the light most favorable to the party opposing the motion"]).

In this case, a material disputed issue exists as to whether Merisel in fact vacated the leased premises precisely on February 28, 2006.[3] Also, if Merisel remained on the premises for a part of March 2006, whether JVA's unpaid rent claim against Merisel for March 2006 should be prorated, as JVA purportedly did with respect to its unpaid rent claim against Color Edge. Hence, Merisel's cross motion for summary judgment dismissing JVA's second cause of action is denied.

The Fifth And Sixth Affirmative Defenses

JVA seeks to strike Merisel's fifth affirmative defense (reservation of rights to add additional defenses) and sixth affirmative defense (incorporation of all other applicable defenses of Color Edge). Merisel argues that the fifth defense merely seeks to restate its rights under CPLR 3025 (b) to amend pleadings with leave of court, and that the sixth defense only seeks to incorporate by reference other defenses of Color Edge, and thus both defenses should not be stricken.

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[3] The Lanjewar Affidavit states that Merisel "occupied the ground floor and basement of the Premises between March 1, 2005 and *approximately* February 28, 2006." *Id.* para. 10 (emphasis added). However, the complaint alleges that Merisel vacated the premises "on [sic] or about March 2006." *Id.* Para 10.

The fifth affirmative defense is not a true defense, but a reservation of rights to assert a potential defense in the future and, as such, is unnecessary and should be stricken. The sixth affirmative defense is improper in that the facts and laws in support of Color Edge's affirmative defenses may not wholly apply to Merisel, and thus this defense should likewise be stricken. Accordingly, JVA's motion to strike the fifth and sixth affirmative defenses of Merisel is granted.

The Attorneys' Fees Claim

The complaint's fourth cause of action seeks payment by Color Edge and Merisel of the legal fees incurred, and to be incurred, by JVA in the prosecution of this action. JVA asserts that defendants' payment obligations arise under their lease agreements with JVA. Defendants argue that no fees should be awarded, for the various reasons stated in their oppositions.

Defendants' arguments are inapplicable to JVA's instant motion, which only seeks to strike affirmative defenses and to amend the complaint's third cause of action. In any event, any award of attorneys' fees, if at all, will be necessarily limited to the actual amount of fees incurred and subject to the standard of reasonableness.

Accordingly, it is hereby

ORDERED that plaintiff's motion seeking leave to amend the third cause of action of its complaint is granted on consent;

and that the amended complaint, a copy of which is annexed as Exhibit H to Gregory Lansky's Affirmation, is deemed served on defendants Color Edge and Merisel, who shall file a responsive pleading to the amended complaint within 20 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that plaintiff's motion to strike Color Edge's affirmative defenses is granted with respect to the second, third and fourth affirmative defenses, and is otherwise denied; and it is further

ORDERED that plaintiff's motion to strike Merisel's affirmative defenses is granted with respect to the first, second, fifth and sixth affirmative defenses; however, the motion to strike Merisel's third and fourth affirmative defenses is denied, for the reasons stated above; and it is further

ORDERED that Merisel's cross motion for summary judgment dismissing the second cause of action is denied.

Counsel for the parties are directed to appear for a preliminary conference on August 29, 2008 at 11 AM in room 335 at 60 Centre Street.

Dated: 4/28/08

ENTER:

WALTER B. TOLUB

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK