

29 John Street, LLC v HVA Corp.

2008 NY Slip Op 31515(U)

June 2, 2008

Supreme Court, New York County

Docket Number: 0603544/2006

Judge: Barbara Kapnick

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

PRESENT: KAPNICK
Justice

PART 12

29 JOHN STREET, LLC

INDEX NO. 603544/06

- v -

HVA CORP.

MOTION DATE _____

MOTION SEQ. NO. 02

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 and cross-motion
are decided in accordance with
the 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: 6/2/08

[Signature]
BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
29 JOHN STREET, LLC,

Plaintiff,

-against-

HVA CORP.,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 603544/06
Motion Sequence No. 002

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff 29 John Street, LLC, the owner of a certain commercial condominium unit comprised of nine commercial stores located on the ground floor of the building known as 29 John Street a/k/a 71-73 Nassau Street in Manhattan¹ commenced this action against defendant HVA Corp., the commercial tenant of one of the ground floor commercial units, operating a pizzeria known as 'Primo Pizzeria', seeking:

(i) a permanent injunction enjoining defendant from preventing plaintiff and/or its principals, agents, employees and contractors from entering the premises for the purpose of rendering necessary repairs and/or replacements including, but not limited to, removing the present exhaust system and installing an exhaust system which is in accordance with law and which will discharge the fumes and odors from the premises in a lawful and safe manner (first cause of action);

¹ The seventeen story building was originally utilized for commercial purposes only. However, the upper floors were converted to residential luxury apartments in 2005 and 2006.

(ii) a permanent injunction directing that defendant permit access to the premises to allow plaintiff to perform the exhaust system work (second cause of action);

(iii) a permanent injunction enjoining defendant from preventing plaintiff and/or its principals, agents, employees and contractors from entering the premises for the purpose of rendering necessary repairs and/or replacements including, but not limited to, the replacement of the present sprinkler system within the premises (third cause of action);

(iv) a permanent injunction directing that defendant permit access to the premises to allow plaintiff to perform the sprinkler system work (fourth cause of action);

(v) damages arising out of defendant's breach of the lease in refusing to permit access to plaintiff to perform the work (fifth cause of action);

(vi) damages arising out of defendant's alleged negligence in refusing to provide said access (sixth cause of action); and

(vii) attorneys' fees, costs and disbursements (seventh cause of action).

Defendant's Answer contains affirmative defenses alleging that the Complaint fails to set forth a claim upon which relief can be granted (first affirmative defense), and that plaintiff is estopped from asserting its claims against the defendant as plaintiff created the conditions objected to without the permission, consent

or authority of the defendant and plaintiff's own conduct is the sole cause of any violations that may exist with regard to the defendant's leased premises (second affirmative defense).

Defendant has also asserted a counterclaim seeking to recover damages, including the return of all monies paid pursuant to the lease, for breach of the lease agreement (and, specifically, breach of the covenant of quiet enjoyment), alleging that plaintiff has rendered defendant's continued occupancy of the premises illegal because there is no valid commercial certificate of occupancy.

Background

Plaintiff moved by Order to Show Cause, under motion sequence number 001, for a preliminary injunction requiring defendant to provide access to the premises so that plaintiff could perform the work to the sprinkler and exhaust systems.

The Order to Show Cause was granted on consent pursuant to Stipulation dated November 15, 2006, and plaintiff performed the work on the premises from December 4, 2006 through December 10, 2006.

Defendant claims that at the end of the seven day access period, the premises were left in disarray by plaintiff and its contractors. Specifically, defendant claims that (i) there was no

running water to the sink, (ii) no electricity to the pizza dough machine, (iii) construction debris and dust from the hole in the wall that was created by the contractors to connect the exhaust system was all over the countertops, floor, ceiling, walls and food equipment, (iv) lighting fixtures were disconnected by the contractors and not reconnected, (v) glass ceiling tiles were removed and not replaced, or were replaced by standard non-matching ceiling tiles, and (vi) there was no cover on the electrical panel leaving live wires unprotected and exposed.

Plaintiff claims that it immediately and repeatedly responded that it would make itself available to make the necessary repairs but that defendant refused to grant it access. Plaintiff further claims that even if these conditions existed, they would not have prevented defendant from operating its business.

Defendant further claims that pipes in the premises froze and burst in February 2007 causing a leak to other units within the building, rendering the premises further unsuitable for occupancy.

Plaintiff, on the other hand, contends that the pipes froze due to defendant's failure to provide heat, and that defendant again refused to provide it access to make the necessary repairs.

After defendant failed and/or refused to pay rent and additional rent on the premises for the months of November and December 2006, plaintiff served a Ten Day Rent Demand and then commenced a summary non-payment proceeding in the Civil Court in January of 2007.

Defendant belatedly submitted an Answer in that proceeding and then failed to appear on the Court date of March 4, 2007. As a result, plaintiff was granted a judgment of possession and a money judgment on default in the total amount of \$51,490.00.

Defendant subsequently moved in the Civil Court by Order to Show Cause to vacate the default judgment on the grounds, inter alia, that it was not timely notified of the court appearance. The motion to vacate the judgment was denied by Decision/Order dated April 16, 2007 of Judge Jose Padilla who found that defendant had failed to set forth a meritorious defense.² A New York City Marshal executed on the warrant of eviction on or about May 15, 2007.

On or about August 8, 2007, plaintiff commenced another action entitled, 29 John Street, LLC v. Harmesh K. Mehan and Vanita Mehan, Index No. 110848/07 (no RJI filed), pursuant to a Guaranty they

² That decision was affirmed by Decision/Order of the Appellate Term dated March 24, 2008.

allegedly executed for HVA Corp.'s lease. The Mehan defendants have asserted affirmative defenses to that lawsuit alleging that HVA Corp. was unlawfully evicted from the premises and that the Guaranty is unenforceable due to plaintiff's breach of the lease.

Discussion

Defendant HVA Corp. now moves by Order to Show Cause for an order:

(1) permitting and allowing it to serve and file an Amended Verified Answer and Counterclaims; in order to allege a second counterclaim for breach of contract (i.e., the November 15, 2006 Stipulation) for plaintiff's alleged failure to restore the premises to its former condition and its failure and refusal to perform the work in a good and workmanlike manner, and a third counterclaim for unlawful eviction; and

(2) joining and consolidating with this lawsuit the action against the guarantors on the ground that the claims in the two actions arise out of the same underlying tenancy and facts.

Plaintiff opposes that portion of the motion seeking leave to amend on the grounds that: (i) the motion is untimely as this action has been pending for more than one year and discovery has nearly been completed; (ii) neither counterclaim states a cause of action; (iii) the proposed counterclaims are barred by the doctrine of res judicata; (iv) the counterclaims are completely frivolous

and cannot serve as a basis to amend defendant's Answer, and (v) to the extent that the claim for 'unlawful eviction' is based upon the December 2006 work, it is barred by the Statute of Limitations.

Plaintiff also cross-moves for summary judgment on its first through seventh causes of action, dismissing defendant's defenses and counterclaims and directing a hearing to be conducted to assess plaintiff's damages and legal fees.

That portion of the cross-motion seeking summary judgment on the first through fourth causes of action is granted since said claims are now moot.

Those portions of the cross-motion seeking summary judgment on the fifth cause of action and dismissing plaintiff's second affirmative defense are granted since the record is clear that defendant refused to permit access to plaintiff to perform the work prior to the commencement of this action and that any violations that existed with regard to defendant's premises were not caused by plaintiff's own conduct.

That portion of the cross-motion seeking summary judgment on the sixth cause of action for negligence is denied and said claim is dismissed since it is duplicative of plaintiff's fifth cause of action for breach of the lease.

In the first counterclaim, defendant alleges breach of the covenant of quiet enjoyment on the ground that plaintiff failed to obtain a valid certificate of occupancy. Plaintiff, however, contends that it was unable to obtain a temporary certificate of occupancy reflecting the commercial use of the premises until defendant finally granted it access pursuant to the November 15, 2006 Stipulation, thus allowing it to upgrade the sprinkler system. The building's temporary certificate of occupancy was thereafter issued on January 19, 2007 to reflect the commercial use of the first floor premises.

Significantly, defendant has not alleged any facts showing that its use of the premises was curtailed in any way prior to the obtaining of the temporary certificate of occupancy.

Moreover, the payment of all required rent is a condition precedent to the maintenance of a claim for breach of the covenant of quiet enjoyment. See, *Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117 (1958); *Balzano v Lublin*, 162 AD2d 252 (1st Dep't 1990). Defendant cannot demonstrate that it complied with this condition precedent since defendant was evicted from the premises pursuant to the judgment entered in the Civil Court based on defendant's failure to pay rent.

Accordingly, that portion of plaintiff's cross-motion seeking summary judgment dismissing defendant's first counterclaim is granted.

That portion of the motion seeking leave to assert a counterclaim for breach of the Stipulation is denied as this Court finds that the proposed second counterclaim is without merit since the Stipulation specifically provided that

7. In the event of a breach of this Stipulation, the non-breaching party shall have all rights and remedies available based upon the violation of a court order.

Therefore, defendant was limited to bringing a motion to hold plaintiff in contempt for failing to comply with the so-ordered Stipulation.

This Court also finds that the proposed third counterclaim for unlawful eviction is without merit since defendant was lawfully evicted from the subject premises as a result of the decisions of the Civil Court, as affirmed by the Appellate Term.

That portion of plaintiff's cross-motion seeking summary judgment on its seventh cause of action for legal fees is granted pursuant to Article 24.2 of the Lease, which permits the landlord to recover the cost "of all reasonable legal and other expenses and

costs (including reasonable attorney's fees) incurred by Landlord in obtaining possession of the Demised Premises, [and] in enforcing any provision of this Lease,..."


That portion of the motion seeking an order of consolidation is denied, since summary judgment has now been granted in the instant action.

The issue of the amount of damages and legal fees to be awarded to plaintiff is referred to a Special Referee to hear and report with recommendations (or, upon Stipulation of counsel, to hear and determine).

Upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this matter on the Part 50R calendar for reference to a Special Referee.

This constitutes the decision and order of this Court.

Date: June 2, 2008



Barbara R. Kapnick
J.S.C.

FILED
JUN 03 2008
COUNTY CLERKS OFFICE
NEW YORK
10

Supreme Court
60 Centre Street, New York, New York 10007

Special Referee Clerk, Room 119

Information Sheet

To be attached to a copy of order and filed in Room 119
Special Referee Selection Program

Date: *June 2*, 2008

Title of Action: 29 John Street, LLC v. HVA Corp.

Index No. 603544/06

Issues: Sec order dated: *June 2*, 2008

Estimated Length of Time Needed for Hearing: *1 day or 2 days*

Names, Address and Telephone Numbers

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