

CPW Retail LLC v Gristede's Foods Inc.

2008 NY Slip Op 32551(U)

September 18, 2008

Supreme Court, New York County

Docket Number: 0114759/2007

Judge: Milton A. Tingling

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

PRESENT: HON. MILTON A. TINGLING
J.S.C.
Justice

PART 44

Index Number : 114759/2007

CPW REAIL LLC

vs

GRISTEDE'S FOODS INC

Sequence Number : 001

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE 3/26/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 annexed decision.*

FILED
SEP 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/26/08

mat

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

ALL CASES REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

**HON. MILTON A. TINGLING
J.S.C.**

-----X
CPW RETAIL LLC,

Plaintiff,

Index No. 114759/2007

-against-

GRISTEDE'S FOODS INC.,

Defendant.

-----X
TINGLING, J.:

In this breach of contract action, plaintiff CPW Retail LLC (CPW) moves, pursuant to CPLR 3212, for an order granting it summary judgment in the amount of \$38, 291.28 plus attorneys' fees, costs, and disbursements in this action.

Defendant Gristede's Foods Inc., f/k/a Gristede's Supermarkets, Inc. (Gristede's) cross-moves to amend the answer, pursuant to CPLR 3025 (b).

Gristede's is a Delaware Corporation. CPW is a New York limited liability company that is the landlord of commercial property located on the ground floor of 25 Central Park West, New York, New York (the Premises).

The following facts are not in dispute. On August 31, 1992, Gristede's entered into a lease with CPW to rent the ground floor of the Premises for a period of 15 years, beginning August 31, 1992, and ending August 31, 2007 (the Lease). On September 7, 2006, CPW commenced a landlord and tenant action against Gristede's, *CPW v Gristede's Supermarkets, Inc.* (Index # L&T 089540/2006 [House Part 52, Civ Ct, NY County]), for possession of the Premises following Gristede's default of its rent payments. On September 14, 2006, Gristede's served an answer to said action and interposed several affirmative defenses. On October 31,

2006, the parties entered into a stipulation whereby Gristede's acknowledged a debt of \$53,246.08, representing all rent and additional rents as billed and itemized within the annexed rent ledger (Stipulation I). The execution of the warrant was stayed on the condition that Gristede's remit \$53,246.08 to CPW in three separate installments by December 11, 2006. Gristede's tendered payment pursuant to the terms of Stipulation I and maintained possession of the Premises.

On July 25, 2007, CPW commenced a second landlord and tenant action against Gristede's for rent arrears, *CPW v Gristede's Supermarkets, Inc.* (Index # L&T 080791/2007 [House Part 52, Civ Ct, NY County]) (L&T II). On August 2, 2007, Gristede's served an answer to the action and interposed affirmative defenses of improper service, failure to state a cause of action, payment, waiver, laches, and estoppel. On August 31, 2007, Gristede's vacated the Premises pursuant to the Lease. On October 1, 2007, the parties stipulated to discontinue the action (Stipulation II).

On November 2, 2007, CPW commenced this action, asserting three causes of action for: (1) breach of the Lease, (2) an account stated, and (3) attorneys' fees. CPW is seeking a judgment in the amount of \$38,291.28, together with attorneys' fees, costs and disbursements in this action.

CPW argues that it is entitled to summary judgment because: (1) there is documentary evidence that conclusively establishes its claims for rental arrears, attorneys' fees, and/or additional rents under the Lease; (2) CPW supplied invoices to Gristede's detailing the amounts owed and Gristede's has failed to object or dispute the amounts owed; (3) to date, Gristede's has failed to pay the amounts in dispute; and (4) Gristede's affirmative defenses are boilerplate

defenses, wholly lacking in substance or supporting facts, and insufficient as a matter of law.

Gristede's argues that CPW is not entitled to summary judgment because there is an issue of fact as to: (1) which party breached the Lease; (2) the balance of indebtedness; (3) a proper showing of an account stated; and (4) CPW's entitlement to legal fees. Gristede's further argues that CPW is not entitled to summary judgment because its affirmative defenses are meritorious.

Gristede's cross-moves pursuant to CPLR 3025 (b) for an order granting it leave to serve and file an amendment to its answer, adding a counterclaim against CPW for breach of the Lease.

Pursuant to CPLR 3025, the decision to allow a party to amend his or her pleading is within the court's discretion and permission to amend a pleading should be freely granted (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99 [2d Dept 2007], *affd* 10 NY3d 941 [2008]; *Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]). Moreover, "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' [citation omitted]" and "the legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt' [citation omitted]" (*Lucido v Mancuso*, 49 AD3d 220, 227 [2d Dept 2008]; *see also Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, *supra*). Here, Gristede's looks to amend its answer to include a counterclaim for breach of the lease agreement regarding real estate taxes under the Lease. The record is devoid of any papers in opposition to Gristede's cross-motion to amend its answer. Accordingly, the cross-motion is hereby granted.

To succeed on a motion for summary judgment, a movant must establish its claim or

defense sufficiently to warrant as a matter of law the directing of judgment in its favor under CPLR 3212, and it must do so by tender of evidentiary proof in admissible form (*SRM Card Shop, Inc. v 1740 Broadway Associates, L.P.*, 2 AD3d 136, 140 [1st Dept 2003]). To defeat a summary judgment motion, the opposing party likewise must produce evidence in admissible form to demonstrate the existence of a disputed material issue of fact sufficient to require a trial (*id.*).

Here, CPW has demonstrated its entitlement to summary judgment on its first cause of action for breach of the Lease, and its third cause of action for attorneys' fees. However, CPW has not demonstrated its entitlement to summary judgment on its second cause of action for an account stated because Gristede's has demonstrated that a material question of fact remains as to the balance of its indebtedness.

An agreement to pay rent on a certain date is a material term of a lease. The Court of Appeals has held that “[a] covenant to pay rent at a specified time . . . is an essential part of the bargain as it represents the consideration to be received for permitting the tenant to remain in possession of the property of the landlord” (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 65 [2006], quoting *Fifty States Mgt. Corp. v Pioneer Auto Parks*, 46 NY2d 573, 578 [1979]). Here, it is undisputed that Gristede's failed to meet its obligation to pay rent under the Lease. Therefore, the issue in the instant motion is not whether Gristede's failure to pay rent breached a material term of the Lease. Instead, the salient inquiry is whether under the Lease, Gristede's default triggered any additional fees or expenses, including attorneys' fees.

When interpreting language in a commercial lease, there is a well-established precedent concerning the construction of commercial contracts. The Court of Appeals has held:

“when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms . . . This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arms length”

[citation omitted] (*id.* at 66).

Gristede’s was required to pay “additional rents” under various paragraphs of the Lease (Exhibit E to Affirmation of Kenneth A. Philbin, dated January 18, 2008) (Philbin Aff.).

Additional rents were defined as sums: (1) that equaled 2% of Gristede’s gross annual sales; (2) were comprised of taxes and common charges; (3) were calculated as late fees; and (4) were computed based on a 4% late charge on all rent that was not paid within 10 days of the first of each month and interest on all amounts not paid within 30 days of the due date (*id.*, §§ 41, 42, 43, 44). Additional rents also included reasonable attorneys’ fees, costs and expenses following any default in the payment of rent. Paragraph 19 of the Lease provides:

“If Tenant shall default in the observance or performance of any term or covenant on Tenant’s part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, then, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorneys’ fees, in instituting, prosecuting or defending

any actions or proceeding [*sic*], such sums so paid or obligations incurred with interest and costs shall be deemed additional rent hereunder and shall be paid by Tenant to Owner within 21 days of rendition of any bill or statement to Tenant, therefor, and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages"

(*id.*).

It is undisputed that Gristede's was in default of its rent obligations which resulted in two subsequent actions to recover those unpaid rents. As discussed above, following L&T I, the parties negotiated Stipulation I whereby Gristede's agreed to pay for numerous expenditures, which included attorneys' fees, beyond the amounts set forth within the agreement. Paragraph 11 provides in part:

"Respondent shall be liable and agrees to pay Petitioner all reasonable attorneys' fees disbursements, late charges, and interest that become due under the lease and actually incurred by Petitioner in this proceeding and interest and/or late charges under Index No. L&T 089540/2006 beyond the amounts set forth in this stipulation and rent ledger attached within ten (10) calendar days after Petitioner sends a bill to Gristedes Supermarkets Inc. c/o Red Apple Group, 823 Eleventh Avenue, New York, New York 10019, to the attention of Nicolas Katsoris by certified mail . . . Petitioner may either restore this proceeding for the appropriate relief under this paragraph 11 or bring a new nonpayment case. Respondent reserves all of its rights and defenses under this paragraph 11"

(Exhibit E to Affirmation of Dara Siegel dated February 20, 2008) (Siegel Aff.). Following L&T

II, the parties negotiated Stipulation II whereby CPW agreed to discontinue the action, but it expressly reserved the right to pursue any of its claims, rights, or remedies pursuant to the expired Lease. Stipulation II provides in part:

“1. The parties acknowledge that the term of the Lease expired and terminated on August 31, 2007 (the “Expiration Date”) and agree that Respondent vacated the Premises and delivered possession thereof to Petitioner in the condition required by the Lease on the Expiration Date. Respondent expressly waives and releases to Petitioner, as of the Expiration Date, any and all rights of possession that Respondent had or might have had with respect to the Premises and agrees that Petitioner was entitled to immediately re-enter the Premises and take legal and physical possession thereof on the Expiration Date.

2. The Parties agree that this nonpayment summary proceeding is hereby discontinued in its entirety and, except as expressly set forth herein, without any prejudice to any of the Parties’ claims, defenses, rights or remedies pursuant to the expired Lease or applicable law, all of which are expressly reserved”

(Exhibit H to Siegel Aff.).

Although the Lease expired on August 31, 2007, Paragraph 19 of the Lease expressly allows CPW to recoup any expenditures it made pursuant to Gristede’s rent default in a subsequent action for damages (Exhibit E to Philbin Aff.). Accordingly, CPW has established its prima facie entitlement to judgment as a matter of law with respect to Gristede’s breach of the Lease and its entitlement to attorneys’ fees and additional rents. Inasmuch as CPW was driven to

institute more than one action against Gristede's for the default of its rent obligations under the Lease, the cost of instituting any action to recover the lost funds must be borne by Gristede's (*see Allerand, LLC v 233 East 18th St. Co., L.L.C.*, 19 AD3d 275, 276 [1st Dept 2005]).

Now, the burden shifts to Gristede's to raise a triable issue of fact to defeat summary judgment. Gristede's purports that it does not owe legal fees or any of the late fees in this action because it previously objected to those assessments in its answers to L&T I and II. Louis Palermo, vice president of R.A. Real Estate, Inc., handles the payments of rent and additional rents for Gristede's. He purports that L&T I and II were settled in full and all payments under Stipulation I and Stipulation II are no longer outstanding (Affidavit of Louis Palermo, dated February 20, 2008) (Palermo Aff.).

Although Gristede's contends that the amounts here in dispute were paid in full, it has failed to tender evidentiary proof in admissible form to substantiate its assertions. Moreover, as discussed above, the record demonstrates that CPW is entitled to attorneys' fees above the amounts set forth in Stipulations I and II (Exhibits A, E and H to Siegel Aff.).

Despite these facts, Gristede's contends that CPW is still not entitled to summary judgment because Gristede's has yet to receive an invoice detailing the alleged expenditures. Palermo avers that CPW failed to forward the invoices outlining those costs as required under Article 27 of the Lease, which governs how bills and invoices should be delivered to the corporation. Under that provision, CPW is compelled to deliver all invoices and real estate bills personally or by certified or registered mail to Gristede's outside attorney, Martin Bring, Esq. (Palermo Aff.). Palermo also avers that his office has not received any invoices and/or demands regarding the alleged amount of legal fees listed in Exhibit P to the Becker Affidavit, and thus,

Gristede's maintains that CPW has not established a claim for an account stated.

An account stated has long been defined as an “account balanced and rendered, with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance” [citation omitted]” (*Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 355-356 [1st Dept 2001]). Moreover, “[t]he very meaning of an account stated is that the parties have come together and agreed upon the balance of indebtedness . . . so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained” [citation omitted]” (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]). Here, there is no agreement. There is a dispute between the parties as to the balance of indebtedness.

Gristede's has demonstrated the existence of a disputed material issue of fact sufficient to require trial on CPW's second cause of action for an account stated. Although CPW submitted copies of the invoices it allegedly forwarded to Gristede's to substantiate that it incurred expenses and attorneys' fees totaling \$33,385.08 during a period of 12 months from August 2006 through September 2007 (Exhibit P to Affidavit of David Becker, dated January 10, 2008) (Becker Aff.), CPW has failed to produce evidentiary proof in admissible form that it delivered those invoices as required under the Lease. More importantly, in its reply papers, CPW does not argue that it is entitled to summary judgment on its second cause of action for an account stated (*see* Affirmation of Kenneth A. Philbin, dated March 12, 2008). Instead, CPW asserts that it is only entitled to summary judgment on its first and third causes of action.

Accordingly, it is

ORDERED that the motion is granted to the extent of granting partial summary judgment in favor of plaintiff CPW Retail, L.L.C, and against defendant Gristede's Foods, Inc., f/k/a Gristede's Supermarkets, Inc. as follows:

1. Defendant Gristede's Foods, Inc. is found liable to plaintiff CPW Retail L.L.C. on the first cause of action for breach of the Lease; and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and

2. Defendant Gristede's Foods, Inc. is found liable to plaintiff CPW Retail L.L.C on the third cause of action for attorneys' fees; and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that the second cause of action for an account stated for this action, shall continue; and it is further

ORDERED that defendant's cross-motion for leave to amend th answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiff shall serve a reply to the counterclaim contained in the amended answer within 20 days from the date of said service.

Dated: 9/18/08

ENTER:

mat
J.S.C.
HON. MILTON A. TINGLING
J.S.C.

FILED
SEP 22 2008
COUNTY CLERK'S OFFICE
NEW YORK