

Hamiltonian Corp. v Trinity Ctr., LLC

2008 NY Slip Op 32853(U)

October 17, 2008

Supreme Court, New York County

Docket Number: 113395/06

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Hamiltonian Corporation

INDEX NO. 113395/06

Trinity Centre

MOTION DATE _____

MOTION SEQ. NO. 000

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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

FILED

OCT 20 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/17/08

L. York
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
HAMILTONIAN CORPORATION,

Plaintiff,

-against-

TRINITY CENTRE, LLC,

Defendant.

-----X
LOUIS B. YORK, J.:

Index No. 113395/06

FILED
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NEW YORK

This is an action for a declaratory judgment and other relief precipitated by a Notice of Default and Termination of defendant - restaurant's leasehold interest based on two grounds (1) plaintiff failed to pay all rent due, and (2) plaintiff assigned the lease without prior written notice to the defendant landlord in violation of plaintiff's lease. Plaintiff then commenced this action for a declaration that it was not in default of the lease and sought a Yellowstone Injunction. The Yellowstone Injunction was denied and a termination notice followed after the expiration of the time period to cure in the notice.

Plaintiff has now amended its complaint to assert 13 causes of action. Defendant moves to dismiss the second, fourth through seventh, tenth, twelfth and thirteenth causes of action pursuant to CPLR 3211(a)(7). Defendant also requests attorneys' fees and use and occupancy payment.

The second cause of action challenges the sum of \$54,254.59 in late fees for the period September 1, 2002 through August 1, 2006. In a prior non-payment proceeding in Civil Court, defendant sought this amount of late fees. The Court only awarded the instant

defendant-landlord summary judgment for attorneys' fees and set the matter down for a hearing on attorneys' fees. Defendant-landlord argues that the Civil Court left out any language regarding late fees because it did not have the power to do so since the predicate demand for rent contained no such request. The court cannot accept the defendant's interpretation of the decision. If the decision was not on the merits, the Civil Court judge was obliged to say that it was without prejudice. The omission of such a statement requires this Court to give *res judicata* effect and to grant dismissal of the late fees request.

The 'Decision and Judgment' entered in the Kings County action indicates only that the action was dismissed after a trial held on July 1, 1998. Since such decision and judgment does not specify that the dismissal was not on the merits, we reject plaintiff's claim to that effect (CPLR 5013), and accordingly, conclude that *res judicata* was properly applied to bar the instant action.

(Plantin v All City Insurance Company, 290 AD2d 327, 735 NYS2d 780 [1st Dept 2002])

Defendant's remedy wasn't to bring another lawsuit to collect these fees, but, rather to have either moved to clarify or reargue the Civil Court decision or to have appealed. Its failure to do so, forecloses this issue.

The fourth cause of action contends that defendant vitiated the Notice of Termination based on defendant's acceptance of the rent after the expiration of the Notice. The plaintiff contends that the defendant accepted the rent while there was no proceeding pending which constituted a waiver of the Notice of Default. That is not exactly true. The rent was accepted after this action had been instituted and after the action had been dismissed in error, which

* 4] .

was cured by a subsequent amended decision restoring. Moreover, at the time, defendant believed that the back rent dismissed by this decision was owed to it, and its answer contained a counterclaim for eviction. Thus, defendant believed that it was not accepting any attempt to renew the tenancy after the payment. The rule that once a proceeding is instituted to terminate the tenancy, acceptance of the rent does not constitute a waiver of the alleged breach applies here (*Witcaff v Shopwell*, 112 AD2d 295, 491 NYS2d 740 [2d Dept 1985]; *70 East 77th LLC v Berenson*, 12 Misc3d 1017, 820 NYS2d 693 [Civ Ct NY Cty 2006]). Moreover, the lease contains an express provision in Article 24 that rent may be accepted without waiving any right. While plaintiff argues that the defendant waived this provision, the facts, as noted above, do not support such an assertion. The acceptance of rent where there is clearly a lease provision that such acceptance does not constitute a violation of the lease does not violate the lease (*Excel Graphics Technologies, v CFG/AGSCB*, 1 AD3d 65, 767 NYS2d 99 [1st Dept 2003]). Therefore, the fourth cause of action is dismissed.

The fifth cause of action, is too vague and ambiguous to serve as a predicate for the termination of the lease. Plaintiff asserts that the Notice of Default fails to allege the facts to support the claim that the lease was assigned without notice to defendant.

The Appellate Term, First Department in *D.K. Property v McCong Restaurant*, 187 Misc2d 610, 611, 723 NYS2d 823, 824 [2001] stated that:

The purpose of a Notice to Cure is to specifically apprise the tenant of claimed defaults in its obligations under the lease and of the forfeiture and termination of the lease if the claimed default is not cured within a set period of time.

[5]

Examination of the notice of Default shows that a specific sum of rent is owed and that an assignment of an interest in the lease was made to Michael Panyiotis without the defendant's written consent. The cure date is set forth as September 23, 2006, and that if it is not cured, defendant would seek all the remedies available to it, including the termination of the lease. This Court holds that the Notice of Default is sufficient to supply plaintiff with the information he is entitled to receive. The fifth cause of action is dismissed. To the same effect is the Notice of Termination, which clearly and unequivocally terminates the lease by a specific date and attaches the predicate Notice of Default to the Notice of Termination. As a result, the sixth cause of action is also dismissed.

The seventh cause of action alleges a tortious interference with the contract that plaintiff had with Fox TV to film plaintiff's restaurant for a show entitled "Gordon Ramsey Kitchen Nightmares."

A reading of the complaint establishes that plaintiff has satisfied the elements of a cause of action for such tortious interference which requires:

1. the existence of a valid contract between plaintiff and a third party;
2. defendant's knowledge of the contract;
3. defendant's intentional acts inducing a breach without justification;
4. the breach of the contract;
5. damages.

Lama Holding Co. v Smith, Barney, 88 NY2d 413, 646 NY2d 76 [1996]). All of

[* 6] .

defendant's arguments for dismissal raise questions of fact such as defendant did not have knowledge of the contract, it was never informed of the use of the premises for the filming by plaintiff, although it received rather late notice from Fox TV, defendant's refusal to allow the filming was justified under the contract and plaintiff cannot prove damages. While it might be possible to resolve these issues on a motion for summary judgment, they do not justify dismissal on a 3211(a)(1) motion to dismiss for failure to allege a cause of action. Accordingly, dismissal of the seventh cause of action is denied.

The tenth cause of action seeks damages for a partial constructive eviction. Defendant was performing plumbing work on the plaintiff's portion of the premises. In the course of work, raw sewage was dumped behind the walls, resulting in a noxious smell throughout the restaurant. The plumbing work and the noxious odor caused parts of the premises to be unusable for a two and one half week period resulting in a substantial loss of business. This cause of action is dismissed as a partial constructive eviction can only be asserted as an affirmative defense (*Elkman v Southgate Owners Corp.*, 233 AD2d 104, 649 NYS2d 38 [1st Dept 1996]). The tenth affirmative defense is dismissed *85 John Street Partnership v Kaye Insurance Associates*, 261 AD2d 104, 689 NYS2d 473 [1st Dept 1999], cited by plaintiff as overruling *Elkman*, is not to the contrary. That was a constructive eviction case in which the plaintiff actually left the premises. That did not occur here. Moreover, it appears that the defendant was paying the rent until it left. Here, plaintiff stopped paying the rent well before the eviction occurred. Therefore, the tenth cause of action is dismissed.

[* 7]

Plaintiff's twelfth cause of action seeks damages for interference with prospective business relations. The complaint fails to allege any concrete examples of what specific interference defendant engaged in, justifying dismissal on that basis alone. In addition, the cause of action should have alleged that plaintiff was motivated solely by malice - or ill will beyond economic interests (*Snyder v Sony Music Entertainment*, 252 AD2d 294, 684 NYS2d 235 [1st Dept 1999]). Plaintiff has asserted no such facts. To the contrary, plaintiff has asserted in paragraph 232 of its complaint that "defendant is motivated solely by greed inasmuch as the premises could rent at a significantly higher rate." That is the economic interest that removes the claim for tortious interference with prospective business relations. The twelfth cause of action is dismissed.

The thirteenth cause of action seeks damages for conversion. Plaintiff alleges that defendant placed sandwich boards on its leased premises in defiance of the lease requirements. The defendant claims that Article 40(d) of the lease permits it to remove any signs that are not in the proper place and any non-professionally made signs without being subject to liability. Defendant claims that its signs and sandwich boards conformed to such requirements. This dispute requires a fact finding which cannot be undertaken on a motion to dismiss. The motion to dismiss the thirteenth cause of action is denied.

The plaintiff has sought use and occupancy at the market rate pending the ultimate resolution of this action. The plaintiff is reminded that issue has not yet been drawn and no market rate for the rent has been established. Pending the ultimate resolution of this action,

[* 8]
defendant should pay without prejudice to either side for the use and occupancy of the store at the same rate that was being paid in the last month covered by the lease.

Defendant has also demanded attorneys' fees, costs and disbursements. That amount must await the conclusion of this action and the determination, if any, of who is the prevailing party in this action.

Accordingly, it is **ORDERED** and **DECLARED** that:

1. as to the second cause of action, defendant is not entitled to the \$54,259.59 it sues for in late fees;
2. as to the 4th cause of action, the Notice of Termination was not vitiated by the defendant's acceptance of rent;
3. as to the 5th cause of action, the Notice of Default was a sufficient predicate for the termination of the lease;
4. the prong of the motion to dismiss the 7th cause of action to dismiss the 7th cause of action for tortious interference with contract is denied;
5. the tenth cause of action for a partial constructive eviction is dismissed;
6. as to the 13th cause of action for conversion, the prong of the motion to dismiss is denied;
7. pending a final resolution of this action, plaintiff shall pay for use and occupancy without prejudice to either side commencing on November 1, 2008 at the same rate as it paid on the last month of the lease. It shall also

pay in monthly payments the rent due for each month it withheld the rent, without prejudice, for use and occupancy until all of these payments are completed. Both monthly payments shall commence on November 1, 2008.

- 8. Defendant's demand for attorney's fees, costs and disbursements is denied at this time, but may be renewed at the conclusion of this action.

Dated: 10/17/08

Enter:
lby
Louis B. York, J.S.C.

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