

Peach Parking Corp. v 346 W. 40th St. LLC
2008 NY Slip Op 33606(U)
August 20, 2008
Supreme Court, New York County
Docket Number: 103096/04
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Tollub
Justice

PART 15

Peach Partners Corp.

INDEX NO. 103096/04

MOTION DATE 11/30/07

MOTION SEQ. NO. 014

MOTION CAL. NO. _____

346 W. 40th St

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

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 with
the accompanying memorandum opinion

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

FILED

AUG 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/20/08

WALTER B. TOLLUB S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

PRESENT: TOLUB
Justice

PART 15

PEACH PARKING CORP.

INDEX NO. 103096/04

MOTION DATE 12/08

- v -
346 WEST 40TH STREET, LLC,
ET AL

MOTION SEQ. NO. 15

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 memorandum opinion.

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

Dated: 8/11/08

WALTER B. TOLUB 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: IAS PART 15

-----x
PEACH PARKING CORP.,

Plaintiff,

Index No. 103096/04

Mtn Seq. 014, 015

-against-

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

Defendants.
-----x

WALTER B. TOLUB, J.:

Motion sequence 014 and 015, after much delay resulting in part from an appeal of this Court's October 9, 2007 decision to the Appellate Division, First Department, are consolidated and now resolved in the following memorandum decision.

This action involves a primely-situated Manhattan parking garage which has been allowed to fall into severe disrepair and the continuing quest to determine who, of the many entities involved, is ultimately responsible for paying for those repairs. By motion sequence 014, defendant Kinney Parking Systems, Inc. ("Kinney") moves to reargue this court's decision dated October 9, 2007, and, upon reargument, for an order vacating the portion of the court's decision which allowed plaintiff to amend its complaint to assert three new causes of action. Alternatively, defendant Kinney seeks a stay of the trial in this matter so as to be able to commence and complete discovery on the newly added causes of action asserted against them. By motion sequence 015, defendant Kinney moves to dismiss the newly-asserted cross-claim

for constructive eviction made by defendant Hertz Corporation ("Hertz") on the grounds that it is insufficient pursuant to CPLR 3211 and is violative of a prior order of the Appellate Division, First Department.¹

Background

Recognizing that a significant amount of time has elapsed since this matter has been discussed, the facts of this case, briefly summarized, are as follows.

Defendant West 40th Street, LLC ("West 40th") is the owner of the Manhattan parking garage at issue in this action. In 1978, West 40th and Kinney entered into a prime lease for the garage ("the prime lease"). Under the terms of the prime lease, Kinney accepted the premises "as is" and was obligated, among other things, to (1) keep the premises in good condition and (2) make all structural and non-structural repairs. Kinney's expenditures for keeping the premises in good repair was capped, by the terms of the prime lease, at \$50,000.

Kinney never occupied the premises. Instead, Kinney sublet the garage to plaintiff Peach Parking Corporation ("Peach Parking"), which occupied the premises from March, 1978 until November 26, 2001. In November, 2001, Peach Parking entered into a sublease (the sub-sublease) with defendant Hertz. Hertz

¹ The court notes that defendant Kinney, in motion sequence 015 additionally requested additional time to answer Hertz's cross claim and for a stay of the trial in this matter.

commenced occupancy of the garage in March, 2002, but asserts that the existence of dangerous conditions prevented them from occupying the space in its entirety. In 2004, Peach Parking commenced the instant action, which, in its original form, sought a declaration that it was not responsible for any repairs that had to be made to the property. Plaintiff filed its Note of Issue and Certificate of Readiness on March 30, 2006, and Hertz vacated the garage on June 30, 2006. The court notes that it appears that plaintiff re-let the garage to a new tenant prior to the submission of this motion. That tenant, according to the submission of the parties, was, as of November, 2007, operating the premises as a commercial parking garage (November 29, 2007 Affirmation of Stacy L. Ceslowitz, ¶2).

Decision of October 9, 2007

In June of 2007, plaintiff moved to amend its complaint to assert three additional causes of action against defendants, specifically damages for repairs from West 40th and Kinney (the fourth and fifth cause of action) and outstanding and additional rent from Hertz (the sixth cause of action). By decision dated October 9, 2007, this court granted plaintiff's motion to amend, and further granted Hertz' request for leave to assert a cross-claim for constructive eviction.² This decision was appealed to

² This court's October 9, 2007 decision stated in pertinent part as follows:

The portion of the motion seeking to add the sixth cause

the Appellate Division, and subsequently affirmed, in its entirety, in June of 2008 (Peach Parking Corp. v. 346 West 40th Street, LLC, 52 AD3d 260 [1st Dept 2008]). The portion of defendant Kinney's motion in sequence 014 which sought reargument of the October 2007 decision is thus denied as moot. The balance of motion sequence 014, which sought time in which to complete discovery on the two newly asserted causes of action is granted, as is, to some extent, the request to stay the imminent trial of this matter.

Discussion

The remaining issues to be addressed therefore, lie exclusively within motion sequence 015.

Contrary to the position taken by defendant Kinney, on a motion to dismiss, the only issue before the court is whether plaintiff's facts, as alleged and believed to be true, form the basis of a "cognizable legal theory" upon which plaintiffs may

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.

succeed (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Campaign For Fiscal Equity, Inc. v. State of New York, 86 NY2d 307, 318 [1995]). See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial [James Publishing 2007] §36.01 et seq.).

Here, defendant Hertz was given the express permission of this court to interpose a defensive cross-claim against defendant Kinney for constructive eviction. Inasmuch as a claim for constructive eviction may lie under either a landlord-tenant relationship or by virtue of a contractual relationship, dismissal of the cross-claim is not warranted at this juncture (see, Wright v. Catcendix Corp., 248 AD2d 168 [1998]).

This brings this court to the issue of continued discovery and the resetting of a date for trial.

Clearly, there is a need for discovery with respect to the newly added causes of action allowed by this Court's October 2007 decision, as well as the issue of whether Peach Parking sublet the garage in late 2007 to yet another entity operating a parking garage and whether that sublease relationship continues to exist today. Also apparent, is the need for discovery with respect to defendant Hertz' newly asserted cross-claim for constructive eviction. As such, this court directs the following:

1. Within 30 days of service of a copy of this order with

notice of entry, counsel is to serve demands for discovery on the above-outlined issues.

2. Within 60 days of service of a copy of this order with notice of entry, counsel is to create and circulate a deposition schedule covering the remaining depositions to be conducted in this matter.
3. All remaining depositions, in the absence of an order of this court dictating otherwise, are to be completed by December 22, 2008
4. Counsel for the parties are directed to appear on Monday, September 8, 2008 at 9:30 a.m. in IA Part 15, Room 335, 60 Centre Street New York, New York, to apprise this court of (1) the progression of discovery and (2) to report on the status of plaintiff's decision to change counsel and to determine whether additional discovery schedule modification is warranted.

Lastly, Counsel shall appear for a Pre-Trial Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York on January 9, 2009 at 11:00 at which time this matter will be set down for trial.

As such, it is

ORDERED that the portion of motion sequence 014, advanced by defendant Kinney Parking Systems, Inc. seeking reargument of this

court's October 9, 2007 decision is denied as moot; and it is further

ORDERED that the balance of motion sequence 014 seeking additional discovery is resolved in accordance with this court's decision; and it is further

ORDERED that the portion of motion sequence 015, advanced by defendant Kinney Parking Systems, Inc., seeking to dismiss the cross-claims interposed against them by defendant Hertz Corporation pursuant to CPLR 3211 is denied; and it is further

ORDERED that portion of the motion advanced by Kinney Parking Systems, Inc. in motion sequence 015 seeking time to answer the cross-claims interposed against them by defendant Hertz Corporation is granted, and defendant Kinney shall answer said cross-claims within 30 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the balance of motion sequence 015 pertaining to discovery is resolved in accordance with this court's decision.

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

Dated:

9/20/08

FILED
AUG 25 2008
COUNTY CLERK'S OFFICE
NEW YORK

[Signature]

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