SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No. 100787/08
Motion No.:

SOUTHPORT LLC,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

THE HYLAN GROUP, INC.,

Defendant

The following items were considered in the review of this motion for summary judgment and dismissal of defendant's affirmative defenses.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves pursuant to CPLR § 3212 for an order granting summary judgment on the issue of liability; and pursuant to CPLR § 3211(b) for the dismissal of the defendant's affirmative defenses. Additionally, the plaintiff's motion also seeks an award of fees and costs. The plaintiff's motion is granted to the extent it seeks an order of summary judgment and the dismissal of the defendant's affirmative defenses.

Facts

The plaintiff landlord entered into a lease agreement with the defendant for 10,000 square feet in a building located at 1150 South Avenue, Staten Island, New York. The agreed upon term was five years and four months commencing on September 1, 2002 and ending on December 31, 2007. The plaintiff alleges that during the term of the lease the defendant undertook the

improvement of the leasehold by installing various items including doors, light fixtures ceiling tiles and cabinetry. The plaintiff further alleges that prior to the expiration of the lease on December 31, 2007, the defendant set out to remove the improvements it made to the leasehold and damaged the property in the process.

The lease agreement between the parties at section 4.04 entitled Tenant Alterations anticipates and permits tenants to alter the premises if certain guidelines are followed. In conjunction with that paragraph section 4.09 entitled Title to Improvements and Restoration of Demised Premises at paragraph (a) states that:

> [t]he title to all additions, repairs and replacements to any improvements made during the Lease Term and any renewal thereof, forthwith shall vest in Landlord, and said improvements , additions, repairs and replacements shall be and become the sole and absolute property of Landlord, without any obligation of payment by Landlord therefor.

In addition, paragraph (b) of the same section states that:

> [a]ll alterations, decorations, additions or improvements, except movable trade fixtures made by either party, shall become the property of Landlord upon installation, ***unless*** Landlord shall elect otherwise, which election shall be made by giving notice not less than thirty (30) days prior to the expiration of other termination of this Lease or any renewal or extension thereof. *In the event Landlord shall elect otherwise, then, such alterations, installations, additions or improvements made by Tenant upon the Demised Premises as Landlord shall elect, shall be removed by Tenant and* ***Tenant shall restore the Demised Premises to the original condition, at its sole cost and expense, prior to the expiration of the term of the Lease. All damage or injury to the Demised Premises and to its fixtures, appurtenances and equipment caused by Tenant moving property in or out of the Building, or by installation or removal of furniture, fixtures or other property, shall be repaired by Tenant*** . . . (emphasis added)

According to paragraph 11.03 of the lease agreement the defendant had a duty to return

the premises in a "broom clean and in good repair, excepting reasonable wear and tear."

The defendant does not dispute that it removed certain items from the leased premises at the termination of the lease. Furthermore, John DiLeo, Jr. the president of the corporate defendant avers that on July 29, 2008 he returned twenty-four doors with the understanding that his workers would hang them thereby allegedly restoring the premises to its original condition. However, pursuant to the terms of the lease there is no indication that the plaintiff, landlord, elected to have the defendant's improvements removed from the premises.

Discussion

Summary Judgment

The burden of a court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist.[1] As such, summary judgment is a drastic remedy that will only be awarded when there is no triable issue of fact and the court can render a decision as a matter of law.[2] To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tendering evidentiary proof in admissible form.[3] Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.[4] To defeat a motion for summary judgment, the opponent must also produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, and mere conclusions,

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[1] *See, Dyckman v. Barrett*, 187 AD2d 553, [2d Dep't, 1992].

[2] *See, Barclay v. Denckla*, 182 AD2d 658, [2d Dep't, 1992].

[3] *See, Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446, [1st Dep't, 1992].

[4] *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

expressions of hope, or unsubstantiated allegations or assertions are insufficient.[5] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[6]

In this case there is no question that the defendant removed a variety of fixtures from the premises it leased from the plaintiff. Rather, the defendant seeks to persuade this court to adopt an interpretation of the agreement between the parties that limits the plaintiff's remedy solely to having the defendant restore the premises to its original condition. The court cannot accept that argument.

Based on the evidence before the court, the defendant violated the terms of the lease agreement as a matter of law when it damaged the property and failed to return it to its original condition. The defendant's argument that the plaintiff's sole remedy is to have it restore the property would also fail even if this controversy arose during the pendency of the lease agreement. There is no evidence in this record that the plaintiff landlord ever elected to have the defendant remove the various improvements from the premises under the express terms of the lease.

Absent admissible proof rebutting the evidence demonstrating the plaintiff's *prima facie* entitlement to summary judgment summary judgment on liability must be granted.

Dismiss Affirmative Defenses

The means for evaluating the dismissal of an affirmative defense are akin to those evaluating a motion to dismiss a complaint for failing to state a cause of action. In other words,

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[5] *See, Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446, [1st Dep't, 1992].

[6] *See, Glennon v. Mayo,* 148 AD2d 580 [2d Dep't 1989].

the allegations raised in the answer's affirmative defenses are given every possible favorable inference.[7]

The plaintiff moves to dismiss the defendant's five affirmative defenses raised in its answer. With respect to the defendant's first affirmative defense, the Appellate Division, Second Department held in *Bentivegna v. Meenan Oil Co.* that failure to state a cause of action cannot be raised as an affirmative defense in an answer.[8] As such the plaintiff's first affirmative defense shall be struck.

This court finds that the other affirmative defenses raised by the defendant fail to satisfy the procedural requirements set forth in CPLR § 3018. The statute states 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 . . .

The court finds that in this case the remaining affirmative defenses contained in the answer do not implicate any facts that were not pled in the complaint. As such, they do not meet the requirement to be characterized affirmative defenses as a matter of law.

Accordingly, it is hereby:

ORDERED, that Southport LLC's motion is granted to the extent that it seeks summary judgment and dismissal of the defendant's affirmative defenses; it is further

ORDERED, that summary judgment is granted as to liability only, the Clerk of the Court is directed to enter judgment on liability in favor of the plaintiff against the defendant The Hylan

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[7] Siegel, NY Prac § 269 at 450 [4th ed].

[8] 126 AD2d 506, [2d Dep't 1987].

Group, LLC; it is further

ORDERED, that Southport LLC's motion to dismiss the defendant's affirmative defenses is granted in its entirety; and it is further

ORDERED, that the parties shall return DCM Part 3 on March 26, 2009 at 9:30 A.M. for a compliance conference.

ENTER,

DATED: February 24, 2009

Joseph J. Maltese
Justice of the Supreme Court