

Jack Kelly Partners LLC v Zegelstein

2009 NY Slip Op 32999(U)

November 30, 2009

Supreme Court, New York County

Docket Number: 600351/08

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. MICHAEL D. STALLMAN **PART 7**

Justice

JACK KELLY PARTNERS LLC,
Plaintiff,

- v -

JOSEPH ZEGELSTEIN and ZEGELSTEIN d/b/a
J&E REALTY,
Defendants.

INDEX NO. 600351/08

MOTION DATE 7/9/09

MOTION SEQ. NO. 002

MOTION CAL. NO. 40

The following papers, numbered 1 to 4 were read on this motion to dismiss

Notice of Motion— Affidavits — Exhibits
Answering Affidavits — Exhibits (and memo)
Replying Affidavits

PAPERS NUMBERED

1-2

3

4

Cross-Motion: Yes No

FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion to dismiss by defendants is granted in part to the extent provided herein; and it is further

ORDERED that defendant shall serve and file an answer to the amended complaint on or before January 7, 2010; and it is further

J.S.C.

ORDERED that the parties are directed to appear for a status and disclosure conference on January 28, 2010 at 9:30 AM in IAS Part 7, 111 Centre St Room 949, New York, New York. Copies to counsel.

Plaintiff allegedly entered in a lease for space to be used for commercial purposes with defendants, pursuant to which plaintiff is not permitted to use or occupy the demised premises for any purpose or in any manner which violates the certificate of occupancy of the demised premises. However, in December 2007, plaintiff allegedly discovered that the certificate of occupancy permits only residential use. Plaintiff alleges that defendants misrepresented that the space could be used for commercial purposes, and that such use would comply with the certificate of occupancy. Plaintiff admits that it occupied the space up until May 9, 2008. The original complaint asserted causes of action for a judgment declaring that the lease is invalid, unenforceable and illegal, for a preliminary and permanent injunction against defendants from collecting rent

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

or otherwise enforcing the defendants' rights under the lease, for breach of contract, breach of the covenant of good faith and fair dealing, for violation of General Business Law § 349, and for fraud. Defendants moved to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7).

By decision and order dated July 28, 2008 (Seq. 01), this Court granted in part, defendant's prior motion to dismiss the original complaint; the order dismissed all claims except the first cause of action, for a declaratory judgment. When the order issued, the Court did not know that defendant Joseph Zegelstein had died several weeks before. Because the death of a party automatically stays an action until the appointment of an estate representative, the July 28, 2008 order was a nullity. Accordingly, by an Interim order of October 23, 2008, this Court stayed the action and vacated its July 28, 2008 order. By stipulation dated February 24, 2009, counsel agreed that the stay be vacated and the caption be amended to substitute the executors (Elsa and Debra Zegelstein) in the stead of the deceased.

On April 21, 2009, plaintiff filed an Amended Complaint alleging three causes of action: for declaratory judgment, breach of contract and rescission of the lease. The Amended Complaint did not replead four of the six causes of action alleged in the original complaint: fraud, breach of covenant of fair dealing, GBL § 349 and injunctive relief. Plaintiff here moves to dismiss the Amended Complaint.

The third cause of action, for breach of contract and the claims in the other causes of action sounding in or predicated on fraud or misrepresentation or mistake, and the claims seeking money damages, which flow from them, are dismissed.

Paragraph 57 (C) in a rider to the lease states, in pertinent part:

"Landlord [J&E Realty] makes no representations that the use to be made of the Demised Premises, as specified herein, is consistent with permitted uses under the existing certificate of occupancy issue[d] for the Building. In the event that such use is inconsistent with said certificate of occupancy and further, that the Department of Buildings or other governmental agency having jurisdiction, issues a violation based on such inconsistent use, this Lease, shall be terminable by Landlord in accordance with the provisions for notice set forth herein, on thirty (30) days' prior written notice to Tenant."

Sava Affirm., Ex A, at Page 12 of 21. Paragraph 21 of the Lease also states,

"Neither Owner nor Owner's agents have made any representations or promises with respect to the by [sic] physical condition of the building, . . . or any other matter or thing affecting or related to the demised premises, except as herein expressly set forth. . . . All understandings and agreements heretofore made between the parties hereto are merged in this contract, which alone fully and completely expresses the agreement between the Owner and Tenant"

Id., Ex A. The documentary evidence therefore conclusively establishes a defense, as matter of law, to plaintiff's claim that the landlord breached an alleged promise that the premises may be legally used and occupied as commercial space, and to plaintiff's claim that the landlord falsely represented that the premises could be used for commercial purposes. "Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations." Danann Realty Corp. v Harris, 5 NY2d 317, 320-321 (1959).

Paragraph 24 of the lease, provides for an abatement in the event that the landlord is unable to deliver possession of the space by reason of a holdover, ongoing construction or for any other reason that the owner is unable to deliver possession. However, plaintiff states that it occupied the premises until May 9, 2008, and then decided itself to vacate the premises. Moulinos Opp. Aff. ¶ 9. Plaintiff's admission that it had occupied the premises refutes the claim that defendants did not deliver possession of the premises.

Moreover, the lease clearly delivered the premises in "as is" condition. As a prospective lessor, plaintiff had the normally assumed responsibility to use due diligence in researching the premises, including performing a search of public records readily available for inspection. Had plaintiff done this, it would have discovered the residential C of O. Under these circumstances, as a matter of law, plaintiff cannot claim breach of contract, or misrepresentation, reasonable reliance or mistake. Because plaintiff should have discovered the C of O before signing the lease and occupying the premises, it cannot claim that defendant acted to deprive plaintiff of occupancy or plaintiff's right to occupancy; therefore, no breach of the covenant of quiet enjoyment can be alleged. Plaintiff's conclusory allegations are belied by the documentary evidence and are legally insufficient to state a claim even when viewed in a light most favorable to plaintiff. During the

approximately two years of its occupancy, plaintiff conducted business in the premises and received the benefit of its bargain. Accordingly, it had the obligation to pay the lease rent and cannot assert any claim in contract or equity for a refund of what it paid for its use of the space. Neither can it seek the money damages it claims, inter alia for moving expenses and various asserted business losses.

Plaintiff's original fourth cause of action, for breach of the covenant of good faith and fair dealing, is now included in the breach of contract claim, and is dismissed. "A claim for breach of the Implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." Skillgames, LLC v Brody, 1 AD3d 247, 252 (1st Dept 2003). "No obligation can be implied . . . which would be inconsistent with other terms of the contractual relationship." Murphy v American Home Prods. Corp., 58 NY2d 293, 304 (1983).

The fifth cause of action of the original complaint, for violation of General Business Law § 349, was not included in the amended complaint. However, to the extent that plaintiff may attempt to argue illegality and then cite GBL § 349, any such claim must be dismissed. Defendants' challenged acts and practices are not "consumer-oriented." "The statute's consumer orientation does not preclude its application to disputes between businesses per se, but it does severely limit it." Cruz v NYNEX Information Resources, 263 AD2d 285, 290 (1st Dept 2000). "Consumers' are 'those who purchase goods and services for personal, family or household use.'" Medical Soc. of State of New York v Oxford Health Plans, 15 AD3d 206, 207 (1st Dept 2005)(citations omitted). Here, paragraph 57(B) of the rider to the lease provides that plaintiff "shall use and occupy the Demised Premises for general offices of an executive recruiting firm specializing in the decorative design community . . . but for no other purpose whatsoever." Sava Affirm., Ex A. Defendants' allegedly false marketing of the lease would therefore be limited to businesses, and the conduct would not carry over to consumer transactions. Ludl Electronics Products, Ltd. v Wells Fargo Financial Leasing, 6 AD3d 397, 398 (2d Dept 2004).

As to plaintiff's cause of action for rescission (First Cause of Action), plaintiff cannot claim mutual or unilateral mistake because, as discussed supra, plaintiff's erroneous assumption as to the C of O could have been timely corrected had it used due diligence, because the C of O is a readily accessible public document. Indeed, paragraph 57(c) of the lease, quoted supra should have placed plaintiff on notice to check the C of O and other public documents, and applicable laws, codes and zoning regulations.

However, the Court cannot say under these circumstances that plaintiff cannot state or prove a cause of action for rescission based on impossibility, when the allegations are viewed in a light most favorable to the pleader.

Plaintiff alleges that the subject lease is impossible of being performed legally because the lease requires solely commercial use while the C of O requires only residential use. Moreover, because the object of the lease was commercial, i.e., plaintiff's conduct of its business, a C of O permitting commercial use is a sine qua non for continued legal occupancy; it could thus be argued that a commercial C of O was integral to the object of the lease and that its absence frustrates plaintiff's purpose.

While the parties' lease places on plaintiff the responsibility to seek any governmental permit or license needed to conduct its business, the Court notes that an owner's active participation would be required were any application to be made to the City to change the C of O so as to conform it to the commercial use. It is not at all clear, and cannot be determined on this motion, what if any attempts were made by plaintiff to seek a C of O change, including seeking defendant's assistance, and what if anything defendant did or did not do to cooperate with plaintiff so as to obtain or facilitate a changed C of O. To the extent that plaintiff seeks an equitable remedy, these issues become significant.

Similarly, while sufficiently stating a claim to be freed from the lease, at least prospectively (particularly payment of rent when unable to conduct business), it would be inequitable to permit plaintiff to seek rescission ab initio if that would negate its obligation to pay past rent for the period of its occupancy, during which it conducted business. Moreover, the Court notes that the existing C of O was available to defendant as well as plaintiff.

For the same reasons discussed supra, plaintiff cannot legally state a claim to recover the money damages sought for moving expenses, loss of business, interruption of business, loss of good will, damage to reputation and payment of rent already paid.

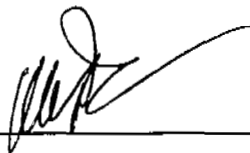
Defendants' motion is denied as to the second cause of action for declaratory judgment. Inasmuch as plaintiff's use of the premises under the lease is contrary to the certificate of occupancy, and defendants have allegedly refused to revise, alter, or correct the certificate of occupancy to permit the agreed upon use

and have not terminated the lease, a justiciable controversy lies as to continued validity or enforceability of the lease. Because plaintiff does not dispute defendants' contention that commercial use is not permitted under the certificate of occupancy, a justiciable controversy exists irrespective of whether a violation has been issued. In the Court's view, paragraph 57(C), cited above, does not preclude plaintiff from raising failure of consideration as a basis for opposing the prospective enforcement of the lease, i.e., after it vacated occupancy. See Verschell v Pike, 85 AD2d 690, 691 (2d Dept 1981) (failure of consideration for long-term lease which violated zoning law, and defendant was not amenable to procuring variance); see also Turmon v Fantasia Auto Inc. 147 Misc2d 450, 452 (Nassau County Dist Ct 1990).

The issue of defendants' entitlement to attorneys' fees is premature.

Copies to both counsel by mail.

Dated: 11/30/09
New York, New York


 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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