

Courthouse Corporate Ctr., LLC v Shulman
2009 NY Slip Op 33307(U)
February 23, 2009
Sup Ct, Suffolk County
Docket Number: 08295/2008
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOTION DATE: 07-23-2008
ADJ. DATE: 02-19-2009
MOT. SEQ: 001 MG
002 MD

P R E S E N T :

Hon. RALPH T. GAZZILLO
A.J.S.C.

-----X
COURTHOUSE CORPORATE CENTER, LLC, : **BAUMAN, KATZ & GRILL, LLP**
 : Attorneys for Plaintiff
Plaintiff(s), : 28 West 44th Street, Suite 900
 : New York, New York 10036
 :
- against - :
RICHARD SCHULMAN, INDIVIDUALLY and : **MICHAEL B. SCHULMAN &**
D/B/A LAN ASSOCIATES and LAN : **ASSOCIATES, P.C.**
ASSOCIATES, : Attorneys for Defendant
Defendant(s). : 145 Pinelawn Road, Suite 310N
-----X Melville, New York 11747

Upon the following papers numbered 1 to 18 read on this motion to dismiss affirmation defenses ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 9 -11 ; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 12-15; 16-18 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq 001) by plaintiff, Courthouse Corporate Center LLC, (hereafter Courthouse) for an order dismissing the counterclaim and affirmative defenses of the defendants is decided herewith, and it is further

ORDERED that the cross-motion (seq 002) by defendants for partial summary judgment dismissing plaintiff's first and second causes of action as against Lan Associates and granting summary judgment dismissing the complaint in its entirety as asserted against the defendant, Richard Schulman, individually, and d/b/a Lan Associates, is decided herewith, and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for the named defendants, pursuant to CPLR 2103(b)(1), (2) or (3), within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

Plaintiff, Courthouse, is the owner of premises located at 320 Carlton Ave., Central Islip, NY. On October 30, 2001, Lan Associates, by its president, Richard Schulman, entered into a lease with plaintiff for a unit in the building known as Suite 3800. The lease commenced on December 1, 2001 with a term of seven (7) years and two months, until January 31, 2009.

The lease provided for the payment of rent and utilities. The annual rent for the fourth year of the lease covering the period of time from December 1, 2004 through December 1, 2005 was \$141,109.85. For the fifth year covering the period of time from December 1, 2005 through December 1, 2006, the annual rent was \$146,163.15. For the sixth year of the lease, the annual rent was \$151,418.57.

Thereafter plaintiffs served a termination notice upon defendants alleging the failure to pay rent in the total amount of \$40,740.91, from April 2005 through March 2007, in the total amount of \$40,740.91. The notice called for vacating the premises by April 5, 2007. However, on April 3, 2007, defendants obtained a stay of the termination notice by order of this Court (Weber, J.) and a further Order (Tanenbaum, J.) dated August 31, 2007, which granted a Yellowstone Injunction in order to permit the tenants to cure their default.

The latter also order authorized plaintiffs to commence a holdover proceeding in order to recover possession of the premises. Plaintiff thereafter commenced a summary proceeding in the District Court, Suffolk County. On October 9, 2007, the parties entered into a written Stipulation settling the matter. Pursuant to its terms the tenant agreed to vacate the premises by December 31, 2007 and to make certain payments to Courthouse. Pursuant to Paragraph 16 of the Stipulation, Courthouse reserved its right to recover money arrears in the form of rent of other monies owed.

Plaintiff has now commenced this action seeking rent and additional rent, plus interest, attorney's fees, and costs and disbursements. In their Answer, defendants allege five affirmative defenses, i.e., collateral estoppel, res judicata, breach of the covenant of quiet enjoyment, constructive eviction, and a breach of warrant of habitability. Defendants have also asserted a counterclaim seeking attorneys' fees.

Plaintiffs now move for an order dismissing the counterclaim and affirmative defenses and the defendants move for partial summary judgment dismissing the first and second causes of action and against all the defendants. The defendants also cross-move for summary judgment dismissing the complaint against the defendant, Richard Schulman, individually and d/b/a Lan Associates.

The plaintiff's first and second causes of action seek rent in the amount of \$40,740.91 and attorney's fees for the period of the lease from April 2005 through March 2007. Defendants' cross-motion for partial summary judgment dismissing those causes of action is based upon the Order dated August 31, 2007 by Justice Tanenbaum.

The parties agree that Justice Tanenbaum's order was a proposed order submitted by the Lan group (the Lan defendants were the plaintiffs in that action). That Order dealt with the issuance of a

Yellowstone Injunction. It also dealt with a request by the Lan group for an order and stay precluding Courthouse from commencing or maintaining a holdover proceeding to cancel or terminate the lease.

A reading of the August 31st order reveals that the Lan group were granted a Yellowstone Injunction to the extent that they were given a stay of the cure period provided by the lease in order to rectify their default and avoid a forfeiture of the lease. Further, the Court did not grant the Lan group a stay or otherwise preclude Courthouse from commencing a summary or holdover proceeding. The disputed sentence is found in the last sentence of the first paragraph of the Order. It states: "Since 2005 based on documentation supplied by plaintiff, the Plaintiff has paid all current rents billed since June 2005."

Defendants here contend that this sentence was a finding of fact by the Court. Plaintiff argues that it is merely a contention made by the Lan group and was not a specific finding of fact by the Court that the Lan group had paid its rent since June 2005.

A fair reading of the Order reveals that the sentence was meant as nothing more than a restatement of the Lan group's contention. In the sentence immediately preceding the disputed sentence, the Court inserted the handwritten word "allegedly" when referring to claims of problems by the Lan group as tenants in the building. Clearly, the Court considered the word "allegedly" to refer to the disputed sentence as well. Further, if the Court had made a specific finding of fact that the tenant had paid the rent it would have stayed Courthouse from commencing a summary proceeding. If the rent had been paid the need for a summary proceeding would be obviated. Instead, the Court refused Lan's request for a stay on just that issue. Clearly, therefore, the defendant's motion for partial summary judgment dismissing the first and second causes of action is denied.

The defendant also moves for summary judgment dismissing the complaint as against the defendant, Richard Schulman, individually and d/b/a Lan Associates. However, defendant has not demonstrated its entitlement to summary judgment. As noted by plaintiff, the lease was executed by Richard Schulman, as President of Lan Associates. Whether plaintiff was aware that Lan Associates, Inc. was really the entity involved in the lease or not or whether defendant concealed the corporate identity is a matter that can not be resolved on this motion as a matter of law. In any event, plaintiff notes that no discovery has been conducted in this action. Accordingly, this portion of the motion for summary judgment is denied without prejudice to renew after discovery has been completed.

The defendants have not specifically addressed any of the arguments raised by plaintiffs in their motion to dismiss the counterclaim and affirmative defenses asserted in the Answer. With regard to the counterclaim seeking attorney's fees, suffice it to say that the Court could not find any provision in the Lease authorizing the tenants to recover attorney's fees. Nor do the defendants point to any provision. Accordingly, the counterclaim is dismissed.

The affirmative defenses of collateral estoppel and res judicata are also dismissed. Since the defendants have not specifically addressed plaintiff's motion on these issues, it is difficult to determine what the defenses refer to. If they relate to the order of Justice Tanenbaum, they are dismissed. Further, the Stipulation of the parties dated December 31, 2007, in the holdover proceeding in the District Court, permitted Courthouse to seek the recovery of past due rent and other monies owed it.

Moreover, the defenses of eviction and constructive eviction are dismissed. Defendants do not dispute that they voluntarily abandoned the premises pursuant to the Stipulation.

The fifth affirmative defense alleges a breach of the warranty of habitability. However, again, defendants have not made any demonstration that any such breach occurred. In any event such warranty only applies to residential leases (*see*, N.Y. Real Prop. Law § 235-b; ***Rivera v. JRJ Land Prop. Corp.***, 27 AD3d 361; ***Polak v. Bush Lumber Co.***, 170 AD2d 932).

In light of the foregoing, the motion by plaintiff is granted and the cross-motion is denied.

Dated: _____

RIVERHEAD, NY

2/23/09

 Ralph T. Gazzillo
 A.J.S.C.

FINAL DISPOSITION _____

NON-FINAL DISPOSITION _____