

**American Express Travel Related Servs. Co., Inc. v
Stamack Constrs., LLC**

2010 NY Slip Op 30407(U)

February 26, 2010

Supreme Court, New York County

Docket Number: 111691-2008

Judge: Judith J. Gische

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Justice

American Express Travel
Related Svc Plaintiff(s),
CO, Ltd

- v -

Slamack Const Defendant(s)

INDEX NO.

111691-08

MOTION DATE

MOTION SEQ. NO.

001

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
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 03 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Feb 26, 2010

J. Gische
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE (H+R)

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 10**

-----X
American Express Travel Related
Services Company, Inc.

Plaintiff (s),

-against-

Stamack Constructions, LLC

Defendant (s).
-----X

DECISION/ ORDER

Index No.: 111691-2008
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf n/m (3212) w/LB affid, exhs	1
Def opp w/DMcW affid	2
Pltff reply w/LB affid, exh	3
Various stips of adj	4

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Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

The parties' dispute arises from a commercial sublease. Plaintiff is the sub-landlord of the premises and defendant is the subtenant. Presently before the court is plaintiff's motion for summary judgment in its favor on the complaint and dismissing all affirmative defenses asserted by the defendant. Defendant opposes the motion. Since issue has been joined and the note of issue has not yet been filed this motion may be heard (CPLR 3212 [a]). The court's decision is as follows:

[* 3]

Arguments

Plaintiff entered into a commercial lease with non-party 40 Wall Street, LLC the owner of the building located at 40 Wall Street, New York, New York ("building"). The Trump Organization is the building management company.

Pursuant to a commercial lease between the owner and plaintiff, plaintiff rents the entire 5th and 16th floors at the building. Plaintiff has been leasing the premises from the owner since 1999 and the lease, dated March 11, 1999, is for a period of ten (10) years ("over lease"). Plaintiff entered into a sublease with defendant. The sublease, dated July 27, 2005 ("sublease"), identifies plaintiff as the "sublandlord" and the defendant as the "subtenant." The sublease also incorporates by reference plaintiff's overlease with the owner (sublease article 5).

The sublease requires that the subtenant pay fixed basic rent of \$584,611 per annum in equal monthly installments of \$48,717.58 plus additional rent. "Additional rent" includes the subtenant's share of taxes, operating expenses, electricity and other charges.

The parties' dispute is focused on the "surrender" language in the over lease which is incorporated by reference in the sublease. Article 25 of the over lease requires that any surrender of the premises be in a writing signed by the owner:

"No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an acceptance of a surrender of said premises, and no agreement to accept such surrender shall be valid unless in writing, signed by Owner. No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the lease and the delivery of the keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the premises."

4] The over lease uses the term "Landlord" and "Owner" interchangeably and 40 Wall Street, LLC is identified as the "Owner/Landlord."

Article 25 of the over lease is incorporated by reference in Article 5 of the sublease. Article 5 of the sublease states that:

"The terms "Landlord" in the Lease shall mean Sublandlord herein and the "Tenant" in the Lease shall mean "Subtenant" herein and the term "Lease" shall mean this Sublease."

Defendant stopped paying rent to the plaintiff in March 2008 and it has not paid any rent or additional rent since then. In April 2008 the defendant moved out of the premises. Defendant contends that it surrendered the premises at that time to the Trump Organization because the managing agent had another tenant for the space and the new tenant wanted it for a longer term. Plaintiff argues that not only did defendant have unpaid rent arrears for the month of March 2008 when it left the premises, defendant breached its sublease by failing to provide written notice of surrender of the premises and written acceptance of such surrender. Thus, plaintiff seeks summary judgment on its breach of contract claims for the unpaid rent arrears that accrued to date. According to plaintiff, the total rent arrears as of June 18, 2009 is \$1,022,312.95, plus legal fees. Plaintiff has provided the court with proof that it obtained the approval of the owner's agent (i.e. Trump) to sublease the premises to defendant.

Defendant contends that it was "induced" to break the lease and vacate the premises by the owner's managing agent who had the power to, and did, release defendant from its sublease with the plaintiff. Defendant further argues that plaintiff was not the "true lessor of the office space to [defendant]." According to defendant, it never paid rent to plaintiff, but always paid it directly to the owner, at Trump's direction.

[* 5]
Defendant argues that further evidence of this arrangement is the notice requirement in the sublease. It requires that all notices to the sublandlord be sent to "Brookfield Financial Properties, LLC" a company that shares common ownership of the building with the owner. Finally, defendant claims that the owner constructively evicted it from the premises, without elaborating what happened.

Discussion

Plaintiff has proved that it has an enforceable sublease with defendant, its subtenant, and that the over lease is incorporated by reference in the sublease. Plaintiff has also proved that a valid surrender of the subleased premises requires written notice of the surrender by the subtenant which is accepted in writing by the sublandlord. Plaintiff has proved - and it is unrefuted - that defendant did not comply with either condition.

Even assuming defendant could prove it was "induced" and "pressured" by the Trump Organization and/or the owner to surrender the premises, and it did turn over the keys to the owner or its agent, such facts are still not a viable defense to plaintiff's breach of contract action against it. At best, defendant might have claims against the Trump Organization and/or the owner if they accepted the keys and promised defendant it could get out of the lease without any repercussions. However, neither the owner nor Trump are parties to the sublease, and the over lease describes the procedure for surrendering the premises. There is no privity between the overlandlord/owner and the subtenant (*see, Chock Full O'Nuts, Corp. v. NRP LLC I*, 11 AD3d 385 [1st Dept 2004]).

Arguments by defendant that the owner or Trump is the "actual" sublandlord and

[* 6]
therefore, defendant constructively surrendered the premises to the sublandlord, do not command a different result. Defendant failed to obtain a written acceptance of its surrender of the subleased premises, nor did defendant surrender the premises in writing.

Other statements that the owner wanted to reclaim the property for someone with ties to the Vatican or that one of the new tenants has shady connections are completely unhelpful to defendant and completely unnecessary.

Defendant contends that this motion for summary judgment is premature and it would like discovery. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1st Dept. 2004]). The mere hope, however, that defendant can uncover useful evidence is an insufficient reason to postpone consideration of plaintiff's motion and defendant has failed to demonstrate how further discovery might yield material facts that would warrant the denial of summary judgment at a later time (Seelig v. Burger King Corp., 66 A.D.3d 986 [2nd Dept 2009]). Therefore, this motion is not premature although brought before discovery is complete.

Defendant offers no factual support for its statement that it was constructively evicted. To assert a defense of constructive eviction, the tenant must abandon the premises due to some action by the landlord (Barash v. Pennsylvania Term. Real Estate Corp., 26 N.Y.2d 77, 82-83 1970). Here, the subtenant admittedly left the premises not due to any wrongful act by the plaintiff, but because (allegedly) an agent

7]
of the owner asked it to. Thus, constructive eviction is not an available or viable defense to plaintiff's claims.

Plaintiff has provided written documentation of the unpaid rent arrears owed and how they were calculated. Furthermore, in the event of a breach of the sublease, plaintiff is entitled to recover legal fees from defendant (Article 19 of over lease and Section 19 of sublease). Defendant does not dispute the amount of unpaid rent and additional rent that plaintiff claims is owed. Nor does defendant challenge plaintiff's right to recover attorney's fees. Therefore, plaintiff has proved it is entitled to summary judgment on its claim for breach of contract and entry of a money judgment in the amount of \$1,022,312.95, representing unpaid rent and additional rent through June 18, 2009.

The issue of legal fees is set down for a hearing before a Special Referee who shall report his or her recommendations to the court.

Conclusion

In accordance with the foregoing,

IT IS HEREBY

ORDERED that plaintiff's motion for summary judgment is granted in all respects; and it is further

ORDERED that the Clerk shall enter judgment on plaintiff's breach of contract cause of action (1st cause of action) in the principal amount of One Million Twenty Two Thousand Three Hundred Twelve and 95/100 Dollars (\$1,022,312.95), representing unpaid rent and additional rent through June 18, 2009; and it is further

ORDERED that the issue of the amount of legal fees (4th cause of action) that defendant is required to pay to plaintiff is set down for a hearing before a Special Referee who shall report his or her recommendations to the court; plaintiff shall serve a copy of this decision/order on the Office of Special Referee so that the hearing can be scheduled; and it is further

ORDERED that the remaining claims in the complaint for account stated and anticipatory breach (2nd and 3rd causes of action) are redundant of the breach of contract action; they are hereby severed and dismissed;

ORDERED that any requested relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
February 26, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

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