Bracken & Margolin, LLP v Hub Props. Trust

2010 NY Slip Op 30475(U)

March 2, 2010

Supreme Court, Suffolk County

Docket Number: 30750/09

Judge: Elizabeth H. Emerson

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX
NO.: 30750-09

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 10-28-09
SUBMITTED: 12-24-09
MOTION NO.: 001-MOT D

BRACKEN & MARGOLIN, LLP,

Plaintiffs,

-against-

HUB PROPERTIES TRUST,

Defendants.

BRACKEN & MARGOLIN, LLP
Plaintiff Pro Se
One Suffolk Square, Suite 300
Islandia, New York 11749

THE SHAPIRO FIRM, LLP
Attorneys for Defendant
500 Fifth Avenue, 14th Floor
New York, New York 10110

Upon the following papers numbered 1 13 read on this motion to dismiss ; Notice of Motion and supporting papers 1-8 ; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers 9-11 ; Replying Affidavits and supporting papers 12 ; Other 13 ; it is,

ORDERED that this motion by the defendant for an order dismissing the complaint is granted to the extent that the first, second, third, and fourth causes of action are dismissed; and it is further

ORDERED that the motion is otherwise denied.

The plaintiff leases office space in a building owned and managed by the defendant, Hub Properties Trust (hereinafter "Hub"). On May 1, 1993, Hub's predecessor in interest entered into a lease with the plaintiff's predecessor in interest for 4,335 square feet of office space in a building located in Islandia, New York. On October 11, 2000, Hub and the plaintiff executed the first amendment to the lease which, inter alia, added 2,913 square feet of office space (hereinafter the "expansion space") and extended the lease term to November 30, 2010. The amendment to the lease provided that Hub would reimburse the plaintiff for the actual cost of improvements to the expansion space up to $37,689.60. The parties subsequently engaged a contractor to make improvements to the expansion space. On August 23, 2003, the

plaintiff paid the contractor's successor in interest $49,894 for such improvements. On September 8, 2003, the plaintiff submitted proof of payment and a claim for reimbursement to Hub. Hub denied the plaintiff's claim on the ground that, pursuant to the lease amendment, it was not required to reimburse the plaintiff for invoices submitted after May 31, 2001.

Section 9.01 of the lease required Hub, at its own expense, to maintain and make necessary repairs to the structural elements and exterior windows of the building. In August 2003, the plaintiff began to experience serious intrusions of water into the demised premises from the building's exterior windows, walls, and ceilings as a result of Hub's purported failure to maintain and repair the premises. This condition persisted, on and off, despite the plaintiff's complaints, for approximately four years, causing damage to the plaintiff's offices, wall coverings, ceiling tiles, carpeting, telephone and computer equipment, and making portions of the leased premises unusable for extended periods of time.

Section 5.01 of the lease required Hub to provide the plaintiff with heat and air conditioning, customary cleaning and janitorial services, mowing, grounds-keeping, snow and trash removal in the common areas, window washing, and passenger elevator service. Since August 2003, Hub has purportedly neglected its duty to provide such services.

The plaintiff commenced this action against Hub on August 7, 2009. The complaint contains five causes of action for breach of contract, unjust enrichment, reformation, constructive eviction, and an abatement of rent. Hub moves to dismiss the complaint on the grounds that it has a defense founded upon documentary evidence (CPLR 3211[a][1]), that the plaintiff's claims are barred by the statute of limitations (CPLR 3211[a][5]), and that the complaint fails to state a cause of action (CPLR 3211[a][7]).

The first cause of action alleges that Hub breached the lease amendment by refusing to reimburse the plaintiff for expansion space improvements in the amount of $37,689.60. Section 22 of the lease amendment required the plaintiff to submit its invoices for the expansion space work to Hub no later than six months following the expansion space rent commencement date, which was December 1, 2000. Thus, the plaintiff's invoices had to be submitted to Hub by May 31, 2001. It is undisputed that the plaintiff's invoices were submitted to Hub on September 8, 2003. The plaintiff contends that it was unable to submit its invoices earlier because the contractor did not complete the expansion space work until July 2003. The plaintiff contends that the failure of the contractor to complete the expansion space work in a timely manner rendered impossible the submission of paid invoices to Hub by the May 31, 2001, deadline.

Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome. Until the late nineteenth century, even impossibility of performance ordinarily did not provide a defense. While such defenses have been recognized in the common law, they have

been applied narrowly due, in part, to judicial recognition that the purpose of contract law is to allocate the risks that may affect performance and that performance should be excused only in extreme circumstances. Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract (*see*, **Kel Kim Corp. v Central Markets** , 70 NY2d 900, 902).

Applying these principles, the court finds that the plaintiff's predicament is not within the embrace of the doctrine of impossibility. The inability to complete the expansion space work within six months of the expansion space rent commencement date could have been foreseen and guarded against when the plaintiff negotiated and executed the first amendment to the lease (**Id**. at 902). The fact that the lease required the architect and contractor selected by the plaintiff to be approved by Hub does not warrant a contrary result. Accordingly, the first cause of action is dismissed.

The second cause of action alleges that Hub has been unjustly enriched in the amount of $49,894, which was the actual cost of the expansion space work. It is impermissible to seek damages under the theory of quasi contract when, as here, the suing party is seeking to enforce a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties (*see*, **Clark- Fitzpatrick v Long Island Rail Road Co.**, 70 NY2d 382, 388-389). Contrary to the plaintiff's contentions, the amendment to the lease addresses the nature and scope of the expansion space work by referring to it as "certain improvements set forth in Exhibit F attached hereto." Exhibit F is a diagram of the expansion space with improvements. Section 22 of the lease amendment sets forth the procedure for reimbursement by Hub of the expansion space work up to $37,689.60. Section 10.01 of the lease provides that all alterations, improvements, additions, and installations to the premises shall become a part thereof and remain thereon at the expiration or termination of the lease without compensation or credit to the plaintiff. Additionally, § 28.04 of the lease provides that the plaintiff agrees to accept the premises "as- is" during the renewal term and that the plaintiff shall not be entitled to receive any allowance or credit from Hub for the improvement thereof. The court finds that, under these circumstances, the lease and its amendment clearly cover the parties' dispute regarding reimbursement for the expansion space improvements. Accordingly, the second cause of action is dismissed.

The third cause of action seeks reformation of the lease amendment. The plaintiff alleges that § 22 of the lease amendment was the product of mutual mistake and should be reformed to enlarge the plaintiff's time for submission of its claim to Hub for reimbursement of the costs associated with the expansion space work. A cause of action seeking reformation of an instrument on the ground of mistake is governed by the six-year statute of limitations pursuant to CPLR 213 (6), which begins to run on the date the mistake was made (*see*, **Taintor v Taintor**, 50 AD3d 887, 888), that is when the written contract was executed (**Id**. at 889; *see also*, **First**

National Bank of Rochester v Volpe, 217 AD2d 967, 968), not when the mistake was discovered (**Id** at 968). Here, the lease amendment was executed on October 11, 2000, more than six years before this action was commenced on August 7, 2009. Accordingly, the third cause of action is dismissed as time-barred.

The fourth cause of action for constructive eviction is governed by a one-year statute of limitations (*see*, **Gross v 420 E. 72nd St. Corp.**, 21 Misc 3d 629, 634, *citing* **Jones v City of New York**, 161 AD2d 518 and **Yokley v Henry-Clark Assoc.**, 170 Misc 2d 779, 781). The record reveals that the water leaks that are the subject of the fourth cause of action began on August 8, 2003, and ended on or about September 25, 2007. Thus, the one-year statute of limitations began to run, at the latest, on September 25, 2007. Since this action was commenced approximately two years later on August 7, 2009, the fourth cause of action is time-barred.

Contrary to the plaintiff's contentions, the fourth cause of action fails to state a claim for negligence. As a general rule, to recover damages for tort in a contract matter, it is necessary that the plaintiff plead and prove a breach of duty distinct from or in addition to the breach of contract (*see*, **Non-Linear Trading Co. v Braddis Assocs.**, 243 AD2d 107, 118). The plaintiff has failed to allege or demonstrate that Hub owed it a legal duty independent of its contractual duty and that Hub breached that independent duty (*see*, **Clemens Realty v New York City Dept. of Educ.**, 47 AD3d 666, 667). When, as here, the plaintiff is essentially seeking enforcement of its bargain, the action should proceed under a contract theory (*see*, **Sommer v Federal Signal Corp.**, 79 NY2d 540, 552). Accordingly, the fourth cause of action is dismissed.

The fifth cause of action sounds in breach of contract, not reformation as Hub contends. The plaintiff alleges that Hub has failed to provided the minimum services under § 5.01 of the lease and that it has neglected its obligation to maintain and repair the exterior of the building under § 9.01 of the lease. Thus, the plaintiff alleges that it is entitled to a reduction of the rent from $23 a square foot to $9 a square foot from August 8, 2003, until the present.

Section 5.03 of the lease provides, in pertinent part, that the adjusted monthly base rent shall abate if the premises are rendered substantially untenantable for a period of 72 consecutive hours due to Hub's failure or delay in furnishing the services described in § 5.01 and if the plaintiff does not occupy the premises due to such untenantability. The plaintiff does not allege that it failed to occupy the premises for any period of time. Accordingly, the court finds that the plaintiff is not entitled to a rent abatement due to Hub's alleged failure to provide services under § 5.01 of the lease.

Section 9.01 of the lease provides that Hub shall maintain and make necessary repairs at its own expense to the structural elements and exterior windows of the building. Additionally, section 15.02 of the lease provides that, if the premises or the building is damaged by fire or other casualty, but not rendered substantially untenantable, Hub shall repair and restore the damaged portions thereof. Section 15.03 goes on to provide that the adjusted monthly base

rent shall abate for all or that part of the premises which are rendered untenantable due to fire or other casualty until Hub has substantially completed the repair and restoration work, provided that the plaintiff does not occupy that portion of the premises which are rendered untenantable.

Liberally construing the allegations of the complaint in the plaintiff's favor, accepting the alleged facts as true, and according the plaintiff the benefit of every possible favorable inference (*see*, **Leon v Martinez**, 84 NY2d 83, 87-88), the court finds that the plaintiff's allegations are sufficient to state a cause of action for breach of contract and an abatement of the rent under § 15.03 of the lease. The plaintiff alleges that, due to the defendant's failure to maintain and repair the building, water infiltrated the plaintiff's office space from the exterior windows, walls, and ceilings during rain and snow storms. The plaintiff alleges that almost every office with an exterior window was afflicted with water pouring through the window frames and dripping or pouring from the ceiling. The plaintiff further alleges that the affected offices could not be used for extended periods of time during and after such storms. The court finds that these allegations are sufficient to establish, prima facie, that the affected offices could have been rendered untenantable under § 1503 of the lease such that the plaintiff could not occupy those offices until Hub substantially completed its repair and restoration work. Accordingly, the court declines to dismiss the fifth cause of action.

HON. ELIZABETH HAZLITT EMERSON

Dated: March 2, 2010

_____

J.S.C.