

1350 Broadway Assoc. LLC v 1350 Broadway LLC

2010 NY Slip Op 30774(U)

April 2, 2010

Supreme Court, New York County

Docket Number: 600530/08

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PRESENT.

PART 15

Index Number : 600530/2008
1350 BROADWAY ASSOCIATES

vs
1350 BROADWAY LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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

1, 2, 3

4

5

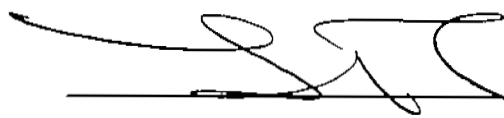
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/2/10



J.S.C.

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
1350 BROADWAY ASSOCIATES LLC,

Plaintiff,

Index No.600530/08

- against -

Decision, Order and Judgment

Mot. Seq. No. 002

1350 BROADWAY LLC,

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HON. EILEEN A. RAKOWER

This action commenced on February 21, 2008 as an Order to Show Cause brought before Justice Shirley Werner Kornreich, seeking a Yellowstone Injunction, staying the period to cure alleged violations of a lease as stated in a Notice to Cure issued by defendant landlord to plaintiff tenant on January 16, 2008. Justice Kornreich, by decision dated March 13, 2008, granted the temporary relief in a short form order as follows:

It is ordered that this motion for a yellowstone injunction is granted. Seventeen of the 18 violations have been cured, and the 18th violation – pointing and facade work – was begun to be cured in October 2006 and is ongoing. P/C ordered forthwith.

Status conferences were held on May 22, 2008, October 16, 2008, and January 8, 2009. The conferences all reflect anticipation that the final violation would be cured and that the case would be resolved. The case was subsequently transferred to Justice Walter Tolub. In a stipulation dated August 28, 2009 and so ordered by Justice Tolub, the parties indicated that all 18 violations referenced in the notice to cure dated January 16, 2008 have been cured and dismissed of record.

Tenant brings the instant motion for summary judgment seeking a permanent injunction, restraining defendant landlord from terminating the subject lease based on the notice to cure dated January 16, 2008. Additionally, plaintiff tenant seeks

judgment dismissing defendant's counterclaim for legal fees. Defendant opposes the motion for summary judgment and cross moves for judgment on its counterclaim for legal fees.

Plaintiff, in support of its motion, provides the March 13, 2008 order of Justice Kornreich; the May 22, 2008 and October 16, 2008 compliance conference orders; an email exchange between attorneys dated August 28, 2009; the August 28, 2009 stipulation so ordered by Justice Tolub; the complaint, verified answer with counterclaim and verified reply to counterclaim; the affidavit of Jack Feirman, Legal Counsel to the supervisor of plaintiff; the lease; a deed dated January 28, 1983 showing the transfer of the subject premises from Aetna Life Insurance Company (the landlord entering into the original lease) to GSL Enterprises, Inc.; an estoppel certificate executed by GSL Enterprises, Inc. October 1, 2003; record of a transfer of the subject premises from GSL Enterprises Inc. To 1350 Broadway LLC dated November 15, 2001; a 30 day notice to cure to Tenant dated January 16, 2008 with attachments; the affidavit of Gary P. Mancini, a professional structural engineer; and a property profile overview for the subject premises as of January 20, 2010.

Plaintiff asserts that all violations reflected in the notice to cure have indeed been cured and dismissed. It represents that its second cause of action which seeks to declare that the notice was invalidly issued is moot, and seeks only the declaration of this court that landlord can not seek to terminate the lease based upon the January 16, 2008 notice to cure. Finally, since plaintiff will retain possession of the premises, it seeks to dismiss the counterclaim for legal fees.

Defendant, in opposition, and in support of its cross motion, provides an attorney affirmation, the notice to cure and an ECB violation issued June 16, 1999. Defendant urges that there is an issue of fact as to whether plaintiff proceeded diligently in curing the final violation, which required pointing and facade work to the building.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49

N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

While both parties agree that all of the violations referenced in the January 16, 2008 notice to cure have been cured, defendant asserts that there is an issue of fact as to whether plaintiff acted in a manner required under the lease. Specifically, Article 14 allows the time to cure any default to be extended provided that tenant shall “take reasonable measures toward the performance of” a cure. Here, defendant claims that the facade violation was issued in 2005, and that it was the notice to cure that prompted plaintiff to cure. It states that there is an issue of fact as to whether plaintiff proceeded diligently, since the work was not completed until June 2009.

A careful review of the facade violation shows that the violation was issued on June 25, 2007 and reflected facade work that was not in compliance with “Local Law 11-1998 (FACADE).” The violation was dismissed as of August 24, 2009. There is no evidence to indicate when work on the facade commenced (although Justice Kornreich indicates the work began in October 2006), and what the parameters of that work were. However, it was agreed that it was ongoing as of the date of Justice Kornreich’s Order dated March 13, 2008, and at subsequent compliance conferences.

Plaintiff has shown *prima facie*, by affidavit of Gary Mancini, that it performed all work required to cure the subject violation. Additionally, it is conceded that work was ongoing as indicated above. The burden shifts to defendant to show, by proof in admissible form, that such work was not performed diligently and that measures taken toward its performance were not reasonable. Defendant fails to make such a showing to raise an issue of fact.

Plaintiff seeks to dismiss and defendant seeks judgment on its counterclaim for legal fees under the lease pursuant to paragraph Fourteenth of the lease. That provision states, in relevant part:

It is further covenanted and agreed, that, in case this lease is terminated, as herein provided, or in case the premises shall be abandoned, the Landlord may at its option enter upon the premises by legal proceedings or otherwise, and let the same for the account of the Tenant, in which

case the Tenant will be liable for any deficiency in the rents, taxes, insurance and other charges by it to be paid, as reserved by the terms of this lease, and, in addition, for the costs and expenses incurred by the Landlord in obtaining possession, and in leasing the said premises.

Plaintiff argues that a strict reading of the above makes tenant liable for legal fees only where the lease has been terminated or premises abandoned. Plaintiff claims that, because it cured all of the violations and has retained possession of the premises, this clause cannot be invoked to require plaintiff to pay legal fees.

Defendant argues that the Court should look to other provisions of the lease to embrace the spirit and intention of the parties. Specifically, it points to the Fourth and Twentieth paragraphs of the lease which emphasize that the Landlord should not be put to any expense in doing the work necessary to comply with laws, orders, regulations, ordinance, requirements or directions. "Such sums as it shall expend in so doing, the said tenant shall and will pay on demand to the said landlord as and for additional rent."

Defendant contends that service of the notice to cure and ensuing litigation were necessary to prompt plaintiff to clear 18 violations and come into compliance as contemplated by the paragraph cited above. However, in pleading its counterclaim, it did not assert its rights under the Fourth paragraph, but rather, it clearly made its claim pursuant to the paragraph Fourteenth of the lease. The language of Fourteenth is not applicable here for the recovery of legal fees, since the plaintiff does retain possession.

This is not meant to bar Landlord from asserting its rights under paragraph Fourth of the lease, to charge tenant as additional rent, those amounts it was forced to expend in doing the work necessary to come into compliance with applicable laws, orders, regulations, ordinances, requirements or directions.

Wherefore it is hereby

ORDERED that Plaintiff's motion for summary judgment is granted as to its first cause of action; and it is further

ADJUDGED and DECLARED that 1350 Broadway LLC is permanently restrained from terminating the lease with 1350 Broadway Associates LLC regarding

[* 6] v.
the subject premises based upon the Notice to Cure and its referenced violations dated January 16, 2008; and it is further

ORDERED that the motion for summary judgment seeking to dismiss defendant's counterclaim is granted and the Clerk is to enter judgment accordingly; and it is further

ORDERED that the cross motion for summary judgment on defendant's counterclaim is denied.

This constitutes the decision, order and judgment of the court. All other relief requested is denied.

DATED: April 2, 2010



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT

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