[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART 57

Index Number : 603704/2007
BARROW, BEN
VS.
LENOX TERRACE DEVELOPMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 603704/07
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion to/for Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Memos of Law M1-M2

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

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

Dated: 5-7-10

MARCY S. FRIEDMAN, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

BEN BARROW and B&H RESTAURANTS, INC.,

Plaintiffs,

Index No.:603704/07

- against -

DECISION/ORDER

LENOX TERRACE DEVELOPMENT ASSOCIATES,

Defendant.

In this action, plaintiff B&H Restaurants, Inc. ("B&H") sues defendant Lenox Terrace Development Associates ("Lenox") for damages based on Lenox's termination of B&H's lease, after a fire occurred at the leased premises where B&H operated a restaurant.[1] Defendant moves for summary judgment dismissing the complaint on the ground that it was permitted to terminate the lease because the fire made the premises untenantable.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party

---

[1]By order dated September 9, 2008, this court granted defendant's motion dismissing Ben Barrow as a party plaintiff to this action.

must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

The relevant facts are as follows: Plaintiff entered into a lease with defendant, dated June 1, 2001 ("Lease"), to rent commercial space in which it operated a restaurant. (Lenox's Motion, Ex. C.) Article 8 of the Lease states that defendant is not liable to plaintiff for any damage to plaintiff's property unless that damage was caused by defendant's negligence. Furthermore, Article 9(d) of the Lease provides that if, as a result of a fire, the premises are rendered "wholly unusable" or if the building is "so damaged that Owner shall decide to demolish it," defendant may terminate the Lease upon notice to plaintiff within 90 days after the fire. On November 10, 2004, a fire occurred in the restaurant's kitchen, causing damage to the premises. According to defendant, by letter dated January 11, 2005, it notified plaintiff that it had elected to terminate the Lease due to the damage that the fire caused to the building and that the Lease would expire as of the third day following plaintiff's receipt of the letter. (Id., Ex. Q.) Defendant subsequently demolished the building as a result of the extensive damage.

When interpreting contracts, courts apply "the familiar and eminently sensible proposition of law that, when parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms." (Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004] quoting W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157, 162 [1990].) In cases involving a fire to a landlord's building, courts have enforced a provision in a lease permitting a landlord to terminate the tenancy if "the premises are wholly unusable or if the building is so damaged that the owner decides to demolish or rebuild it." (See Mawardi v Purple Potato, Ltd., 187 AD2d 569 [2d Dept 1992]; Montgomery Trading Co. v Cho,

11 Misc 3d 1058[A], 2006 NY Slip Op 50272[U] [2006].) Leases containing the above "so damaged" language provide the landlord with "a broader range of discretion than in leases that require total or substantial destruction." (Mawardi, 187 AD2d at 570.) In Mawardi, a case involving a fire to a restaurant in which the landlord demolished the building, the evidence showed that, because of the fire, "the sheetrock ceiling and walls had been removed from the premises, and a skylight had been removed, which opened the restaurant to the elements and caused water damage." (Id. at 569.) The estimated cost to repair the restaurant was $20,000 and would take a least a week to complete. (Id.) The Court held that this evidence was sufficient to find that the restaurant was unusable, and in light of the amount of damage to the building, that the landlord's decision to demolish it "was reasonable" and not in bad faith. (Id. at 569-570.)

Similarly here, defendant produces evidence of the extensive damage caused by the fire, which makes a compelling showing that defendant's demolition of the building was reasonable. Defendant relies on a Notice of Violation, issued by the Environment Control Board ("ECB") on November 10, 2004, stating that the "rear (east elevation) free-standing brick masonry walls [were] in danger of collapsing onto [the] adjacent side yard." (Lenox's Motion, Ex. I.) Defendant also annexes a notice it received from the Department of Buildings ("DOB"), dated November 16, 2004, citing defendant for a violation of Section 27-110 of the Administrative Code. (Id., Ex. H.) In its Description of Violation, the notice states that the "diner [is] extensively fire damaged throughout [the] entire store." In addition, defendant provides an affidavit of George Tockstein, an employee of defendant's managing agent, stating that the fire caused "a large section of the Building's roof [to] collapse[] into the main eating area of the Premises, allowing the sky to be seen from the interior of the Premises." (Tockstein Aff., ¶ 26.)

Mr. Tockstein describes the windows, walls, ceiling, and floor finishes as either "destroyed" or "extensively damaged." (Id., ¶¶ 28, 31.) He further states that "[t]he damage to the physical structure of the Building was so extensive that Lenox's insurance carrier decided that the Building was a 'total loss.'" (Id., ¶ 41.) Defendant also submits a letter from Tower Insurance Company, dated November 11, 2004, attaching an estimate of the actual cash value and loss sustained to the restaurant's fixtures as a result of the fire. (Id., Ex. O.) According to the estimate, the majority of trade fixtures, equipment, and furniture in the kitchen, main dining room and service area, basement, and office sustained total losses, and the restaurant overall sustained a total loss of $106,020. Therefore, defendant makes a prima facie showing that it did not breach the Lease agreement by terminating it and demolishing the building.

Defendant also shows that it complied with the notice provisions of Article 9(d) of the parties' Lease. Defendant annexes its January 11, 2005 letter terminating the Lease and accompanying certified mail receipts addressed to both B&H and B&H's counsel, Edward Myers, Jr., which are postmarked on January 14, 2005. (Id., Exs. Q, R.) A signed return receipt of the mailing by plaintiff's counsel, dated January 19, 2005, is also included. (Id.) Moreover, defendant cites a letter it received, dated January 11, 2005, from Mr. Myers, Jr., in which he acknowledges defendant's plans to demolish the building. (Id., Ex. S.) Thus, the evidence demonstrates that plaintiff received notice of defendant's termination of the Lease within 90 days of the fire.

In opposition, plaintiff fails to raise a triable issue of fact. Plaintiff does not dispute that the fire was not caused by any negligence on the part of defendant. Rather, plaintiff contends that defendant's decision to demolish the building was unreasonable given the extent of the

damage, and was not made in good faith. (See Mem. in Opp. at 5.) In support of its argument, plaintiff attaches photographs of the restaurant after the fire. The photographs, which on their face appear to show extensive damage to both the restaurant and the building, fail to raise an issue of fact as to plaintiff's claim that the premises was not rendered wholly unusable or so damaged as to warrant its demolition. Nor does plaintiff offer any evidence, such as an affidavit of an engineer or architect, to substantiate its claim that the photographs show that the structural damage to the building was minimal.

Plaintiff also provides an affidavit of Ben Barrow, dated May 22, 2008. However, this is the same affidavit that was submitted by plaintiff in opposition to defendant's prior motion to dismiss. Therefore, it fails to address any of the evidence submitted on the instant motion regarding the extent to which the building was damaged – in particular, the ECB and DOB notices and the affidavit of George Tockstein. While Mr. Barrow claims that the premises did not suffer a total loss (see Barrow Aff., ¶ 31 [Ex. B to P.'s Opp.]), he fails to provide any evidentiary support for this wholly conclusory assertion, and the exhibits to which he refers are not attached to his affidavit.

Moreover, plaintiff acknowledges that defendant's right to terminate the Lease and demolish the premises is governed by Paragraph 9(d) of the Lease, which only requires the building to be "so damaged." (See Mem. in Opp. at 3.)[2] Nor does plaintiff raise a triable issue of fact as to whether defendant's decision to terminate the Lease was made in good faith, given the extensive damage to the premises, as shown by the evidence in the record.

---

[2]Plaintiff does not make any argument that Section 48(D) of the Rider to the Lease, rather than Paragraph 9(d) of the Lease agreement, is controlling.

Mr. Barrow also claims that he never received the notice of termination of the Lease. However, in his deposition testimony, he does not dispute that he did in fact see the notice in the early part of 2005, possibly in January. (Barrow Tr. at 156 [Ex. B to Lenox's Reply].)[3] In addition, plaintiff does not dispute that it failed to provide defendant with an address, other than that of the restaurant, for delivery of the notice of termination of the Lease. Accordingly, plaintiff fails to raise a triable issue of fact as to whether the notice was properly served.

The court turns to the branch of defendant's motion seeking dismissal of plaintiff's claim for restitution based on the doctrine of promissory estoppel. Prior to the fire's occurrence, plaintiff allegedly spent large sums of money to develop plans and to obtain necessary permits for the renovation of a sidewalk café. Plaintiff specifically alleges in its complaint that it spent money based on defendant's approval of the renovation and was therefore damaged "[a]s a result of defendant's failure to repair and rebuild the premises after the fire." (Compl., ¶¶ 29-34.) However, plaintiff fails to allege any duty owed to it by defendant, independent of the Lease agreement, which would require defendant to compensate plaintiff for the renovation plans made prior to the fire. (See generally Hoeffner v Orrick, Herrington & Sutcliffe LLP, 61 AD3d 614, 615 [1st Dept 2009].) In addition, the evidence in the record shows that Mr. Barrow, rather than B&H, spent the money planning the renovations. (See Barrow Aff., ¶ 11, Myer's January 11, 2005 letter [Lenox's Motion, Ex. S].) Accordingly, plaintiff's second cause of action will be dismissed.

The court has considered plaintiff's remaining contentions and finds them to be without

---

[3]While new factual matter is ordinarily not properly considered on a reply (see Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1982]), the new evidence that defendant submits responds to plaintiff's argument in opposition to the motion that it never received the letter terminating the Lease. The new evidence is therefore properly entertained. (See Anderson v Beth Israel Med. Ctr., 31 AD3d 284 [1st Dept 2006].)

merit.

It is hereby ORDERED that the motion of defendant Lenox Terrace Development Associates for summary judgment is granted to the extent that the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
May 7, 2010

MARCY FRIEDMAN, J.S.C.