

1350 Broadway Assoc., LLC v Tradings.Net, Inc.

2010 NY Slip Op 31150(U)

May 7, 2010

Supreme Court, New York County

Docket Number: 602165/09

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

1350 BROADWAY ASSOCS, LLC

INDEX NO. 602165/09

MOTION DATE 4/19/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

TRADINGS.NET, INC.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff's motion for summary judgment is granted with respect to liability only; and it is further

ORDERED that the issue of the amount of damages owed to plaintiff is referred to a Special Referee to hear and determine (CPLR 4317 [b]) (see *Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____ J.S.C.

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):

notice of entry, together with a completed Information Sheet,²
upon the Special Referee Clerk in the Motion Support Office in
Rm. 119 at 60 Centre Street, who is directed to place this matter
on the calendar of the Special Referee's Part (Part 50 R) for the
earliest convenient date; and it is further

ORDERED that counsel for plaintiff shall serve a copy of
this order with notice of entry within twenty days of entry on
counsel for defendant.

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated 5/7/10

ENTER: [Signature] J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

²Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x
1350 BROADWAY ASSOCIATES, LLC,

Plaintiff,

Index No.: 602165/09

-against-

TRADINGS.NET, INC.,

Defendant.

-----x
CAROL ROBINSON EDMEAD, J.:

FACTUAL BACKGROUND

Plaintiff moves, pursuant to CPLR 3212, for summary judgment on its first, second and third causes of action.

Plaintiff and defendant entered into a commercial lease for showroom space in the premises located at 1350 Broadway, New York, New York, for the period commencing on November 1, 2003, through October 31, 2008. Motion, Ex. D. Prior to the expiration of that lease, it was modified and extended through April 30, 2011. Motion, Ex. E.

On or about January 22, 2009, plaintiff commenced a non-payment proceeding against defendant in the Commercial Housing Part of the New York City Civil Court. That case was settled by so-ordered stipulation dated May 4, 2009. Motion, Ex. F.

Pursuant to the so-ordered stipulation of settlement, plaintiff was awarded a final judgment of possession against defendant, with the warrant of eviction stayed through June 1,

DECISION

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2009, and defendant was to pay the sum of \$3,500.00 for use and occupancy. In addition, plaintiff would accept the use and occupancy payment without prejudice to seek the full rental amount owed pursuant to the commercial lease, as modified. Further, defendant was to vacate the premises on or before June 1, 2009, and plaintiff reserved all rights under the lease, including its right to commence a plenary action against defendant for all rent and additional rent owed up to and including the date on which defendant actually vacated the premises.

According to the complaint, defendant did vacate the premises on May 31, 2009. However, also according to the complaint, at the time that defendant vacated the premises, it was in default of its rent and additional rent obligations in the amount of \$31,792.65. In addition, plaintiff asserts that defendant is also responsible for rent for the 23 months remaining on the commercial lease, as modified, in the sum of \$157,166.59.

Paragraph 27 (c) of the lease provides, among other things, that:

"Landlord shall retain its right to judgment on and collection of Tenant's aforesaid obligation to make a single payment to Landlord of a sum equal to the total of rent and additional rent reserved for the remainder of the original term of the lease, subject to future credit or repayment to Tenant in the event of rerenting of the premises by Landlord"

Paragraph 22 (B) of the lease states:

"The lease and the obligations of Tenant hereunder shall in no way be affected because the Landlord is unable to fulfill any of its obligations or to supply any services (e.g. heat, electricity, air conditioning (if Landlord is obligated to furnish same), elevators, water) ... Landlord shall have the right, without incurring any liability to Tenant, to stop any service because of accident or emergency, or for repairs, alterations or improvements, necessary or desirable in the judgment of Landlord to the building or the demised premises, until such repairs, alterations or improvements shall have been completed. Landlord shall not be liable to Tenant or anyone else, for any loss or damage to person, property or business, unless due to the negligence of Landlord nor shall Landlord be liable for any latent defect in the premises or the building."

To date, plaintiff states that the premises have remained unoccupied and unrented.

Plaintiff asserts three causes of action against defendant, seeking: (1) \$179,368.24, representing rent and interest owed under the lease, less defendant's security deposit; (2) \$23,361.43, representing additional rent owed under the lease, including interest; and (3) legal fees, in the sum of \$5,000.00.

In opposition to the instant motion, defendant avers that, starting in 2007, the space became unusable due to plaintiff's actions, which involved a major renovation of the building that allegedly blocked access to defendant's entranceway and building lobby. Defendant also says that the bathrooms and air conditioning system did not function due to said construction. In sum, defendant contends that it was constructively evicted from the premises. However, defendant also states that it is not

relying on the provisions of Real Property Law § 227, which permits a tenant to vacate a premises without further liability if the property becomes unfit through no fault of the tenant and there is no agreement to the contrary. In addition, defendant contends that plaintiff has a duty to mitigate damages and has not acted in good faith in attempting to re-rent the premises, and it questions the amounts that plaintiff alleges are due.

In reply, plaintiff maintains that the temporary repairs and alterations to the building do not constitute constructive eviction, that defendant's customers were able to access the premises on the Sixth Avenue side of the building during the renovations, as evidenced by photographs provided by defendant in its opposition papers, and that, pursuant to the lease signed by defendant, plaintiff is not liable to defendant for interruptions in services occasioned by such repairs, alterations and renovations.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to

raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's motion for summary judgment is granted on the issue of liability only.

It is well settled that a commercial tenant may be relieved of its obligations to pay the full rent due when it has been constructively evicted from either a whole or a part of the leasehold. *Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77 (1970). A constructive eviction occurs where the landlord's wrongful acts substantially and materially deprive a tenant of the beneficial use and enjoyment of the premises. *Johnson v Cabrera*, 246 AD2d 578 (2d Dept 1998). However, in order to assert a defense of constructive eviction, the tenant must abandon the premises. *Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, *supra*; *Express Industries Group, Inc. v City of New York*, 4 AD3d 197 (1st Dept 2004).

In the case at bar, "[t]he prior summary proceeding, wherein plaintiff's petition for possession was granted, necessarily decided that defendant[] remained in possession and plaintiff had properly terminated the lease." *The Gallery at Fulton Street*,

LLC v Wendnew LLC, 30 AD3d 221, 221-222 (1st Dept 2006).

Therefore, defendant's failure to abandon the premises defeats its assertion of a valid defense based on constructive eviction.

Furthermore,

"[n]either in the stipulation nor in the record is there any clear and unambiguous waiver by plaintiff[] of [its] rights to recover under the terms of the lease, regardless of the termination of the landlord-tenant relationship itself. Inasmuch as the parties clearly contracted to make defendant liable for damages following termination, the lease provides that [defendant] shall be liable for rent after eviction, and that provision is enforceable [internal citations omitted]."

Ring v The Printmaking Workshop, Inc., 70 AD3d 480, 480-481 (1st Dept 2010).

Even though, in most instances, the issue as to whether a tenant has been constructively evicted raises a question of fact so as to defeat a motion for summary judgment (*Townhouse Company, LLC v Plotkin*, 12 AD3d 269 [1st Dept 2004]), "[h]ere, however, [defendant] failed to put forth specific evidence of conditions rising to the level of constructive eviction." *NYC Goetz Realty Corp. v Martha Graham Center of Contemporary Dance*, 39 AD3d 356, 356 (1st Dept 2007).

In addition, the court finds defendant's argument that plaintiff is required to mitigate damages by re-letting the premises to be unpersuasive. No such duty is imposed on a commercial landlord. *Holy Properties Limited, L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130 (1995).

However, since defendant disputes the amounts claimed, the question as to the amount of damages due and owing to plaintiff is referred to a Special Referee to hear and report on the issue.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted with respect to liability only; and it is further

ORDERED that the issue of the amount of damages owed to plaintiff is referred to a Special Referee to hear and determine (CPLR 4317 [b]) (see *Keeney v Keeney*, 297 AD2d 606 [1st Dept 2002]); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

¹Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

Dated: May 7, 2010

ENTER.


Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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MAY 13 2010
NEW YORK
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