

Gettinger Assoc., LLC v Abraham Kamber & Co. LLC
2010 NY Slip Op 31398(U)
May 28, 2010
Sup Ct, NY County
Docket Number: 0111166/2006
Judge: Debra A. James
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6-3-10

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

GETTINGER ASSOCIATES, LLC and
1407 BROADWAY REAL ESTATE, LLC,
Plaintiffs,

Index No.: 111166/06

Motion Date: 11/05/09

Motion Seq. No.: 08

- v -

ABRAHAM KAMBER & COMPANY LLC,
Defendant.

Motion Cal. No.: _____

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

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

UNFILED JUDGMENT

Cross-Motion: Yes

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).

Upon the foregoing papers,

Defendant, Abraham Kamber & Company LLC ("Kamber"), moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the second through seventh causes of action in the complaint of related action entitled 1407 Broadway Real Estate LLC v Abraham Kamber & Company LLC, which is consolidated with the current action, on the ground that no issues of fact exist to be tried with respect to such causes of action.

Plaintiffs, Gettinger Associates, L. P. ("Gettinger") and 1407 Broadway Real Estate, LLC ("Broadway LLC"), cross-move for

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):

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UNFILED JUDGMENT

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Upon the foregoing papers,

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PART 59

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Defendant, Abraham Kamber & Company LLC ("Kamber"), moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the second through seventh causes of action in the complaint of related action entitled 1407 Broadway Real Estate LLC v Abraham Kamber & Company LLC, which is consolidated with the current action, on the ground that no issues of fact exist to be tried with respect to such causes of action.

Plaintiffs; Gettinger Associates, L. P. ("Gettinger") and 1407 Broadway Real Estate, LLC ("Broadway LLC"), cross-move for

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Check if appropriate: DO NOT POST REFERENCE

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

an order pursuant to CPLR 3212 granting partial summary judgment declaring that all pending notices of default or to cure served upon either plaintiff by Kamber are invalid, and granting plaintiffs a permanent injunction barring Kamber from invoking any such notice as a ground for terminating the sublease between the parties or for any other purpose, on the grounds that, as a matter of law, the notices are defective on their face, in that they failed to provide plaintiffs the contractually required period in which to cure the alleged defaults.

Kamber is the lessee of a 43-story office building located at 1407 Broadway in Manhattan (the "premises" or "building"). Broadway LLC, as successor in interest to Gettinger, is Kamber's current sublessee. Broadway LLC operates and maintains the entire premises, leases space to various tenants from which it collects rent, and pays a fixed annual rent to Kamber, which has no role in the operation or management of the premises. As indicated in Kamber's notice of motion, the complaint at issue is the one served in the action where Broadway LLC was the sole plaintiff. In view of the consolidation, Gettinger will be treated as a co-plaintiff herein.

The gravamen of the complaint is that Kamber breached the sublease and committed intentional torts against Broadway LLC and its predecessor Gettinger in an attempt to wrongfully terminate plaintiffs' leasehold interest. Kamber's current motion is

addressed to the second through seventh causes of action which seek damages. The first and eighth causes of action respectively seek declaratory and injunctive relief.

The second cause of action, labeled Breach of Contractual Obligation to Act Reasonably, alleges that Kamber violated Article 41 of the sublease, which provides that the landlord shall not unreasonably withhold any consent or approval that may be required, by unreasonably failing to confirm that plaintiffs were not in default of their obligations, unreasonably failing to provide the necessary consents and/or certificates to enable Gettinger to enter new leases with major tenants, unreasonably demanding that plaintiffs perform unnecessary repairs, unreasonably demanding that plaintiffs give notices of and performance bonds for "repairs" as opposed to "alterations" anticipated to cost more than \$50,000, and unreasonably performing intrusive inspections of the premises for the purposes of intruding into the relationship between plaintiffs and their tenants and as a predicate for commencing unfounded litigation. The third cause of action, labeled Breach of Obligation to Provide Certificates, alleges that Kamber breached Article 29 of the sublease (Landlord's Certificate) by failing to provide requested written instruments certifying that plaintiffs were not in default under the sublease, thereby causing plaintiffs to sustain damages including the reduction of value of their

leasehold interest and loss of opportunity to lease space to tenants at favorable rates. The fourth cause of action, labeled Tortious Interference with Prospective Contract - the Bank of America Lease, alleges that Kamber wrongfully interfered with Gettinger's attempt to enter into a lease with Bank of America and other prospective tenants by, inter alia, unreasonably refusing to provide Gettinger with a non-disturbance agreement ("NDA") and other documents consenting to the Bank of America lease. The fifth cause of action, labeled Tortious Interference with Prospective Contract - the Assignment, alleges that beginning in mid-2006 and continuing until January 4, 2007, Gettinger negotiated an agreement with Broadway LLC whereby Gettinger was to assign its leasehold interest to Broadway LLC, and that Kamber, which also desired to purchase Gettinger's leasehold interest, sent repeated and baseless notices of default, filed a notice of pendency, and conducted intrusive inspections of the premises for the purpose of finding purported conditions needing repair, in an effort to prevent Gettinger from assigning its interest to anyone other than Kamber. The sixth cause of action alleges that Kamber breached the covenant of good faith and fair dealing implicit in the sublease. The alleged breaches included the following: issuing repeated and unjustified notices of default which led to protracted, unnecessary, and costly litigation; demanding intrusive and unnecessary

inspections of the premises; filing a notice of pendency; wrongfully interfering with Gettinger's assignment of its interest in the sublease to Broadway LLC; and, engaging in an ongoing tortious campaign to terminate plaintiffs' interest in the premises and acquire such interest for itself. The seventh cause of action alleges that Kamber breached the covenant of quiet enjoyment set forth in Article 26 of the sublease by: making repeated and unreasonable demands to inspect the premises in a manner intrusive to the building's tenants; repeatedly serving baseless notices of default; unreasonably refusing to provide certificates, agreements and other documents necessary to the operation of the premises; and, unreasonably interfering with Gettinger's assignment of its interest in the sublease to Broadway LLC.

Kamber argues that the second cause of action is factually and legally unsupportable because the sublease requires that Kamber's consent be given only when plaintiffs propose to sublease the entire building or any single space in excess of 125,000 and when plaintiffs propose to perform alterations and improvements in and to the building anticipated to cost more than \$50,000. Kamber asserts that Gettinger never requested Kamber's consent for either undertaking. Kamber further argues that nothing in Article 41 of the sublease requires Kamber to confirm that plaintiffs were not in default of their obligations under

the sublease, that plaintiffs were in default of their obligations under the sublease to maintain the building in a state of thorough repair and to submit plans and specifications for work in the building costing more than \$50,000, and that Kamber did nothing more than request that Gettinger comply with its obligations under the sublease.

Defendant argues that the third cause of action cannot be sustained because plaintiffs were in default under the sublease and therefore not entitled to the requested documents. It is further asserted that the fourth cause of action for tortious interference with a proposed lease to Bank of America is without factual foundation because there is no evidence that Gettinger ever requested a NDA and Kamber was under no obligation to furnish one. Kamber argues that the fifth cause of action for tortious interference with the assignment of the sublease from Gettinger to Broadway LLC must be rejected as a matter of law because the assignment was consummated. Finally, Kamber avers that the sixth and seventh causes of action for breach of the covenants of good faith and quiet enjoyment are factually deficient because the notices of default and other documents issued by Kamber were fully justified in view of the fact that Gettinger performed work in the building costing more than \$50,000 without prior approval and failed to maintain the building. Kamber adds that it had an absolute right to inspect

the premises and to seek to acquire Gettinger's interest in the sublease.

Kamber has submitted the supporting affidavits to support its claims that the buildings' windows were decrepit and obsolete causing air infiltration and heat loss problems; that the brickwork on the exterior facades was defective and the mortar joints along all of the exterior, parapets and main roof bulkhead walls were substantially deteriorated and that the roofing systems were antiquated and deteriorated. The affidavits also state that any requested certifications required by the sublease were in fact provided.

In opposition, plaintiffs contend that the second cause of action is not limited to alleged violations of Article 41 of the sublease and that the allegations of unreasonableness underlying that cause of action, which are factually supported by affidavits, state a legally viable claim which should not be summarily. Plaintiffs argue that the third cause of action should be sustained because issues of fact exist as to whether Kamber unreasonably refused to provide an estoppel certificate and other documents when requested and whether such failure made it more difficult and costly for plaintiffs to lease space in the building. Plaintiffs defend the fourth cause of action on the grounds that the conduct alleged constitutes both an independent tort and an unjustified infliction of harm and that the

conflicting testimony of the parties' principals presents a credibility issue for the jury. Plaintiffs argue that the fifth cause of action is supported by evidence that Kamber's conduct was undertaken for the sole purpose of harming plaintiffs and was otherwise wrongful or improper. Plaintiffs contend that their remaining causes of action for breach of the covenants of good faith and quiet enjoyment assert legally viable claims and raise numerous factual issues concerning Kamber's allegedly improper conduct.

In support of their cross-motion plaintiffs argue that Kamber's notices to cure dated July 21, 2006, February 16, 2007 and March 26, 2007 are facially defective because the notices failed to give plaintiffs 30 days in which to cure the alleged default as required by the sublease. Plaintiffs argue further that the validity of Kamber's July 20, 2006 notice to cure depends on the date it was mailed and that the validity of Kamber's April 2009 notice to cure is uncertain because it is undated.

Plaintiffs' affidavits aver that the building was in very good condition in late 2006 and in January 2007 when Lightstone (on behalf of Broadway LLC) took possession of the building and thereafter improved it and that Lightstone was forced to finance its acquisition of Gettinger's interest in the sublease under onerous and costly terms because of Kamber's pending baseless

litigation. It is further stated that Gettinger has always maintained the building in thorough repair and in compliance with the sublease and that the work items alleged by Kamber to be "alterations" costing over \$50,000, which require Kamber's prior approval, were renovations to tenant spaces which do not require such approval and/or routine maintenance which did not require prior approval.

Given the voluminous papers before the court and the conflicting affidavits referred to above, a denial of the instant applications would arguably be warranted. However, Kamber's motion is not totally without merit. Plaintiffs rely on Dalton v Educational Testing Service (87 NY2d 384 [1995]) to support their argument that the second cause of action is not limited to alleged breaches of Article 41, but includes breaches of Kamber's implied duty to act reasonably. Dalton stands for the well known proposition that "[i]mplicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance" (supra, at 389). This proposition is the basis of plaintiffs' sixth cause of action which alleges that Kamber breached the covenant of good faith and fair dealing implicit in the sublease. Furthermore, plaintiffs do not dispute Kamber's argument that it did not violate Article 41 of the sublease because the required consents were never requested. Given plaintiffs' duplicative sixth cause of action and their failure

to create a triable issue with respect to Article 41, the second cause of action is properly dismissed as the Article 41 claim is factually unsupported and the good faith claim is subsumed within the sixth cause of action. The third cause of action alleging that plaintiffs were damaged by Kamber's failure to provide estoppel certificates will be sustained. Plaintiffs have stated a legally viable claim (see Juleah Co., L.P. v Greenpoint-Goldman Corp., 49 AD3d 282 [1st Dept 2008]) and Kamber has failed to demonstrate that no triable issues exist with respect to that claim. Plaintiffs' fourth cause of action will also be sustained. "Interference with precontractual relations is actionable in New York when a contract would have been entered into but for the actions of defendant if the defendant's sole purpose is to damage the plaintiff or if the means employed to induce termination of the relationship are dishonest, unfair or otherwise improper." Harden, S.P.A. v Commodore Electronics, Ltd., 90 AD2d 733, 734 (1st Dept 1982). Contested factual issues involving the propriety of Kamber's actions in connection with plaintiffs' prospective lessees cannot be resolved on the basis of the papers before the court.

Plaintiffs' fifth cause of action shall be dismissed. In support of this cause of action plaintiffs cite Jacobs v Continuum Health Partners, Inc. (7 AD3d 312, 313 [1st Dept 2004]) wherein the Court held that a cause of action for tortious

interference with "prospective business advantage" must be supported by allegations that defendant's conduct "was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby." Gettinger asserts that Kamber desired to purchase Gettinger's leasehold interest which was ultimately assigned to Broadway LLC. Plaintiffs therefore implicitly concede that Kamber's conduct was not undertaken solely to harm them but to also further Kamber's interest and therefore this claim cannot be maintained. Guard-Life Corp. v S. Parker Hardware Mfg. Corp., 50 NY2d 183, 190 -191 (1980) ("status as a competitor . . . may excuse [one] from the consequences of interference with prospective contractual relationships, where the interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and the means employed are not wrongful"). Furthermore, serving default notices and inspecting the premises, etc., was not objectively improper or otherwise independently wrongful. See Jacobs, supra, at 313; cf. Kantor v Bernstein, 225 AD2d 500, 501 (1st Dept 1996). Finally, a necessary element of this cause of action is missing because the assignment from Gettinger to Broadway LLC was consummated (see Harden, S.P.A. v Commodore Electronics, supra, at 734).

Based upon the conflicting affidavits of the parties, plaintiffs' sixth cause of action based on Kamber's alleged breach of the implied covenant of good faith and fair dealing (see Dalton v Educational Testing Service, *supra*, 87 NY2d at 389; Jaffe v Paramount Communications, Inc., 222 AD2d 17 [1st Dept 1996]) and seventh cause of action based on Kamber's alleged breach of the covenant of quiet enjoyment as set forth in Article 26 of the sublease will not be dismissed as there are triable issues of fact as to those claims.

With the exception of the validity of Kamber's March 26, 2007 notice of default, which defendant concedes is untimely, plaintiffs' cross-motion shall be denied as there are issues of fact as to whether the pending notices of default are sustainable and authorized under the lease. Finally, plaintiffs have failed to demonstrate their right to injunctive relief as a matter of law (see W.T. Grant Co. v Srogi, 52 NY2d 496, 517 [1981]).

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted to the extent that plaintiffs' second and fifth causes of action are hereby DISMISSED; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is granted only to the extent that is hereby DECLARED and ADJUDGED on consent that defendant's March 26, 2007 notice of default is invalid; and it is further

ORDERED that all other relief sought on the motion and cross-motion is DENIED; and it is further

ORDERED that the parties shall appear at a pre-trial conference on June 29, 2010, at 2:30 P.M, in Part 59, to set a trial date of the remaining causes.

This is the decision and order of the court.

Dated: May 28, 2010

ENTER:

~~Michael J. James~~
HON. DEBRA A. JAMES J.S.C.

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 2200)