

**383 Jericho, LLC v Verizon N.Y., Inc.**

2010 NY Slip Op 31949(U)

July 12, 2010

Supreme Court, Nassau County

Docket Number: 021381/2009

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. IRA B. WARSHAWSKY,**  
**Justice.**

**TRIAL/IAS PART 8**

383 JERICHO, LLC,  
Plaintiff,

INDEX NO.: 021381/2009  
MOTION DATE: 01/15/2010  
MOTION SEQUENCE: 001

-against-

**AMENDED ORDER**

VERIZON NEW YORK, INC.,  
Defendant.

The following papers read on this motion:

|  |   |
|--|---|
| Notice of Motion, Affirmation & Exhibits Annexed .....                             | 1 |
| Memorandum of Law in Support of Motion to Dismiss the Complaint .....              | 2 |
| Attorney's Affirmation in Opposition of Floyd G. Grossman & Exhibits Annexed ..... | 3 |
| Reply Affirmation of John Van Der Tuin in Support of Motion to Dismiss .....       | 4 |

The Order of this Court dated March 18, 2010 is amended due to an error in the caption and is replaced by the following decision.

**PRELIMINARY STATEMENT**

Defendant moves in lieu of an answer to dismiss the complaint on the grounds that the claimed lease by which plaintiff seeks to recover from defendant is invalid and unenforceable, because the leased premises could never have been used by Verizon for the uses specified in the lease; and because plaintiff never obtained a certificate of occupancy as required by the lease agreement.

Plaintiff opposes the motion, contending that the zoning at the subject site permitted the uses intended by Verizon, and there is no obligation to obtain a Certificate of Occupancy for the premises, which were built prior to the issuance of Certificates of Occupancy by Town of North Hempstead, and which constitute a legal prior non-conforming use. In addition, plaintiff alleges that it was the unauthorized work undertaken by defendant which generated action by Town of North Hempstead to require compliance with existing parking requirements, as opposed to the authorized parking pursuant to the status of the premises as a prior legal non-conforming use.

### **BACKGROUND**

By lease dated June 17, 2008 Verizon New York, Inc. (“Verizon”) leased from 383 Jericho, LLC (“Jericho”) premises known as 383 Jericho Turnpike, Floral Park, New York, and a vacant lot on the south side of Jericho Turnpike, New Hyde Park, New York. 383 Jericho Turnpike is improved with a former automobile sales showroom, offices and maintenance facility. According to the lease agreement<sup>1</sup> Verizon “may use and occupy the Premises for the parking, offices, retail, storage, repairing and servicing of motor vehicles and related tools and equipment and for any other legal purpose”. Jericho also represented that such uses were permitted under the existing zoning ordinance affecting the premises, and “agree[d] to maintain at all times during the Term, a certificate of occupancy for the Premises, as amended in accordance with Section 7.5, permitting the use of the Premises as described in this Section 6.1”.

Annexed as Exh. “B” to the lease is a document entitled Landlord’s Work which includes “1. Procure certificate of occupancy in conformance with the Tenant’s use of the Premises (as specified in Section 6.1 of this Lease).

The improvements to the premises were constructed in 1924 and 1931, and pre-dated the requirement for a building permit and certificate of occupancy. As the premises

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<sup>1</sup> Exh. “B” to Motion at ¶ 6.21.

existed on the date of the lease, they were fully useable by tenant for the stated purposes, and compliance with current off-street parking permits was not required. Subsequently, Verizon, without the consent of Jericho or a building or demolition permit from Town of North Hempstead, commenced work at the premises, resulting in a cease and desist order from the Town.

Unfortunately, the undertaking of substantial modifications to the premises triggered the requirement that the building must comply with current zoning restrictions, including the provision of off-street parking for 50 vehicles, as opposed to the 23 which the Town asserts were previously available.<sup>2</sup> Defendant now contends that the failure of plaintiff to obtain a certificate of occupancy violates the terms of the lease, rendering it unenforceable. They further contend that the denial of the application for a certificate of occupancy is evidence that the representations by plaintiff as to the utility of the property for the intended purposes of defendant were untrue, thereby vitiating the lease agreement.

**DISCUSSION**

Defendant’s motion is denied. At the time of the lease the premises could lawfully be used for the intended use as set forth in the lease. Only the unauthorized and illegal conduct of defendant caused the Town to require compliance with current off-street parking requirements.

Defendants reliance on the lease terms calling for plaintiff to provide a “certificate of occupancy” for the premises is, at best, fatuous. The Town of North Hempstead would not, and could not, issue a certificate that the premises are in compliance with the zoning and building codes in effect as of the date of the certification, and defendant is chargeable with this knowledge. Implicit in all contracts is a warranty of good faith and fair dealing. All defendant was entitled to receive was a Certificate of Existing Use, which is simply a statement that the improvements pre-date the requirement for the issuance of a certificate

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<sup>2</sup> Exh. “4” to Motion.

of occupancy, and are therefore permitted to remain in their present condition.

It is remarkable that the actions of defendant, illegal and without the approval of plaintiff, have generated a requirement which is physically impossible for plaintiff to provide, and that defendants rely upon this conduct to assert that the lease is thereby rendered unenforceable.

Dismissal based upon a defense founded upon documentary evidence, as defendant alleges, is warranted only if the documentary evidence submitted conclusively establishes a defense to asserted claims as a matter of law.<sup>3</sup> The Court's task is to determine whether plaintiff's pleading states a cause of action, and the motion must be denied if, from the four corners of the pleadings, and any submissions in opposition to the motion to dismiss, there can be gleaned any cause of action cognizable at law.<sup>4</sup> In this process, the complaint must be liberally construed, and the Court will accept as true facts alleged in the complaint and in any submission in opposition to the motion.<sup>5</sup>

The documentary evidence relied upon by defendants does not clearly refute the claim set forth in the complaint. In its simplest form, plaintiff alleges a contract, which by its terms, enabled defendant to occupy the premises for the stated uses in the lease. The obligations with respect to the maintenance or obtaining a certificate of occupancy must be read in terms which are reasonable, and the parties would be justified in understanding. The lease should not be interpreted in a manner so as to render performance under it a factual impossibility; rather, the parties are bound by an implicit covenant of good faith and fair dealing.<sup>6</sup>

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<sup>3</sup> Civil Practice Law and Rules § 3211 (a)(1).

<sup>4</sup> *Polonetsky v. Better Homes Depot*, 9 N.Y.2d 46, 54 (2001); See also, *511 West 232<sup>nd</sup> Owners Corp. V. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002).

<sup>5</sup> *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1977); See also, *Sokolov v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001).

<sup>6</sup> *511 West 232<sup>nd</sup> Owners Corp.* at 152;

This covenant embraces the pledge that neither party will undertake any action which will have the effect of depriving the other party of the fruits of the contract.<sup>7</sup> The actions by defendant in performing the unapproved construction at the premises has caused plaintiff to lose the benefit of a legal non-conforming use, and, at this point, has deprived them of the benefit of leasing the premises for the use as contained in the lease between the parties. Defendant, in addition to allegedly breaching the lease agreement by failing to pay the rental upon which they have agreed, has breached the covenant of good faith and fair dealing by making alterations to the property without obtaining a permit therefore, thereby depriving plaintiff of the beneficial use of the property.

The fair and reasonable interpretation of the unfortunate language referring to a Certificate of Occupancy, should be interpreted as requiring, at most, that plaintiff produce a Certificate of Existing Use, which it undoubtedly could have done before defendant interjected itself with unauthorized construction, which may have permanently jeopardized the issuance of such a document.

Defendant is directed to serve an Answer to the Complaint within ten (10) days of service upon them of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of the Court.

Dated: July 12, 2010

  
J.S.C.

**ENTERED**  
JUL 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>7</sup> *Dalton v. Educational Testing Svce.*, 87 N.Y. 2d 384, 389 (1995).