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| BLT Steak, LLC v 57th St. Dorchester, Inc. |
| 2010 NY Slip Op 32865(U) |
| October 13, 2010 |
| Supreme Court, New York County |
| Docket Number: 112271/09 |
| Judge: Jane S. Solomon |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 112271/2009
BLT STEAK LLC
 vs.
57TH STREET DORCHESTER
 SEQUENCE NUMBER : 002
 SUMMARY JUDGMENT

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

this motion to/for _____

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

FILED
 OCT 15 2010
 COUNTY CLERK'S OFFICE
 NEW YORK

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

*See annexed decision
 NB 11/15/10 pre Trial
 Met ~~and~~ at end.*

Dated: 10/13/10


 JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
BLT STEAK, LLC,

Plaintiff,

-against-

THE 57TH STREET DORCHESTER, INC.,

Defendant.

Index No. 102271/09

FILED
OCT 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

-----X
JANE S. SOLOMON, J.S.C.:

This action arises out of a commercial landlord-tenant dispute. Plaintiff BLT Steak, LLC (BLT), the tenant, moves for summary judgment on its complaint, and for an order dismissing defendant's counterclaim for attorney's fees. Defendant The 57th Street Dorchester, Inc. (the Dorchester) cross-moves for summary judgment dismissing the complaint. The complaint alleges that, on or about July 13, 2009, the Dorchester served a Notice to Cure, alleging that BLT allowed water to penetrate from the kitchen of its restaurant through the ceiling of the garage below, causing damage to the steel reinforcement bars and structural slab in the ceiling of the garage. The Notice to Cure also purports to require BLT to cure that alleged default by having a licensed contractor perform certain specified actions, using specified tools. The complaint seeks an order, pursuant to *First Natl. Stores v Yellowstone Shopping Ctr.* (21 NY2d 630 [1968]), tolling BLT's time to cure the purported default; a preliminary and permanent injunction barring the Dorchester from taking any action to terminate BLT's lease (Lease) or to commence

summary proceedings to evict BLT, or otherwise interfere with its possession of the premises; a declaration that BLT is not in default of the Lease, and that the Notice to Cure is defective as a matter of law; and damages for an alleged violation of the covenant of good faith and fair dealing that is implied in the Lease.

Inasmuch as the Dorchester withdrew the Notice to Cure, by letter dated April 1, 2010, both the request for a *Yellowstone* injunction, and that branch of plaintiff's request for declaratory relief that bears on the alleged invalidity of the Notice to Cure, are moot. The claim for breach of contract must be dismissed, because the only damages that BLT alleges are the attorney's fees that it has incurred in bringing this defensive action. Absent an allegation of fraud, and no such allegation has been made here, attorney's fees may, generally, not be recovered without statutory authorization, an agreement between the parties, or a court rule. See *Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528 (1st Dept 2010).

To be sure, sanctions, including the payment by one party of the other party's attorney's fees, may be imposed for frivolous conduct, and this is the second time that the Dorchester has served a notice to cure, alleging damage from a leak originating in plaintiff's premises, and the second time that it has withdrawn such notice upon plaintiff's commencement of a *Yellowstone* action. However, plaintiff does not allege that service of the second notice was frivolous, and accordingly,

[*4]
sanctions against defendant are not in order at present.

For the following reasons, I am granting that branch of BLT's motion which seeks an order dismissing the Dorchester's counterclaim for attorney's fees. The only provisions for such fees in the Lease appear in paragraphs 18 and 19 thereof. The provision in paragraph 18 applies solely to attorneys' fees "incur[red] in connection with reletting" the premises in the event that the tenant has been ousted from possession. The provision in paragraph 19, as modified by Insert 4 thereto, provides, in relevant part, as follows:

If Tenant shall default in the observance of any term ... then Owner may ... perform the obligation of Tenant ... and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, incurs any obligation for the payment of money, including but not limited to reasonable attorney's fees and related costs for actions taken to collect any and all obligations under this lease and to otherwise enforce any and all of the Owner's rights with respect to this lease and, in addition, fees and costs incurred in connection with a bankruptcy filing by the Tenant ..., and prevails in any such action ... such sums so paid or obligations incurred ... shall be deemed to be additional rent

(Emphasis added.) The italicized language, which appears in Insert 4, replaced the following phrase, as it appears in the Standard Form of Store Lease of the Real Estate Board of New York, Inc.: "in instituting, prosecuting or defending such action or proceeding." The added language is clearly intended to broaden the grounds upon which the Dorchester may recover attorney's fees, and other costs, beyond instances of self-help, or of BLT's failure to pay the rent that is due. However, the

added language does not unambiguously allow the Dorchester to recover fees in an action such as this one, where the Dorchester, having withdrawn its Notice to Cure, after several months of discovery, remains in this case solely as the defendant of a declaratory judgment action, and is not, now, in the position of having taken action to "enforce any and all of [its] rights with respect to this lease." Notably, as discussed above, the revision of section 19 of the Lease deletes the reference to recovering costs that are incurred in defending an action. "Legal fee clauses must be strictly construed" (*Duane Reade v High Point Assocs. IX, LLC*, 36 AD3d 496, 497 [1st Dept 2007], citing *Gottlieb v Such*, 293 AD2d 267, 268 [1st Dept 2002]), and, more generally, any ambiguity in Insert 4 must be construed against the Dorchester, because Insert 4 was indisputably drafted for its benefit.

In sum, the only claim remaining in this action is plaintiff's request for a declaration that it is not in breach of the Lease. With regard to that claim, plaintiff has submitted an affidavit signed by Ronald Sancho, who states that he has 50 years of experience in the construction industry, and that he has concluded that the steel reinforcement bars and the structural slab in the garage beneath plaintiff's premises have not been damaged. The Dorchester, on the other hand, has submitted an affidavit signed by Walter Melvin, who states that he has been licensed as an architect since 1969, and that he has concluded that leakage of water from plaintiff's kitchen has caused damage

to both the structural steel and the concrete slab underlying the kitchen. Inasmuch as these conflicting affidavits establish a disputed issue of fact as to the remaining issue, both parties' motions for summary judgment, as to that issue, must be denied.

Accordingly, it hereby is

ORDERED that both plaintiff's motion for injunctive relief and plaintiff's motion for a declaratory judgment as to the validity of the notice to cure are dismissed as moot; and it further is

ORDERED that plaintiff's motion for summary judgment is granted to the extent that defendant's counterclaim for attorney's fees is dismissed, and the motion is otherwise denied; and it further is

ORDERED that defendant's motion for summary judgment is granted to the extent that the third cause of action in the complaint is dismissed; and it further is


ORDERED that the remainder of this action shall continue; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on November 15, 2010 at 2 PM.

Dated: 10/13/10

FILED
OCT 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:


U.S.C.
JANE S. SOLOMON