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

PRESENT: James A. Yates PART 49

Index Number : 600744/2010
CECO STUDIOS, L.L.C.,
vs
C&D WEST 14TH TH STREET
Sequence Number : 001
DISMISS ACTION

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

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER, DATED 10-7-10

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

Dated: OCT - 7 2010

James A. Yates 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 49

CECO STUDIOS, L.L.C., Plaintiff, -against- C&D WEST 14TH STREET LLC Defendant.	Decision and Order Index No. 600744-2010

Hon. James A. Yates, J.

Defendant C&D West 14th Street LLC move, pursuant to CPLR 3211 (7) for dismissal of the complaint, or, in the alternative, pursuant to CPLR 6301, for a preliminary injunction. The following allegations are taken from the complaint.

Plaintiff Ceco Studios, L.L.C. owns a building at 441 West 14th Street (the Building). The Building has been used for many years as a production and sound stage business by the plaintiff. By lease dated November 29, 2007 (the Lease) (defendant's exhibit 1), defendant agreed to attempt to develop and renovate the Building for use as an upscale eatery and marketplace.

The Building is located in a landmark district, and as such, development requires approval of the New York City Landmarks Preservation Commission. Because the Building is also situated in an M1-5 zoning district, where food stores are not an as-of-right use, a special permit from the City Planning Commission is also required. In the Lease, defendant agreed to use commercially reasonable efforts (CRE) to obtain these approvals at its own expense. If these approvals were not obtained by defendant within 26 months (Approval Deadline), either party could terminate the Lease by written notice within ten days after the deadline. (defendant's exhibit A, art 2 [b]).

The Lease was a triple net long-term 25 year lease, with a renewal right to extend the term for an additional five year period unless terminated as described above. Rent for Lease Years 1 through 5 was $4.5 million annually, with rent increases every five years such that the total rent for the initial 25 year term was $151, 703, 508.00. Defendant was also to deposit with plaintiff an irrevocable and unconditional letter of credit for

$3 million in plaintiff's favor upon execution of the Lease. Defendant's principals each deposited letters of credit for half that amount with the plaintiff.

Required approvals were not obtained within 26 months. On January 29, 2010, plaintiff exercised its option to terminate the Lease (defendant's exhibit 2). Plaintiff commenced this action on April 22, 2010 asserting three causes of action: (1) breach of the lease; (2) breach of an implied duty of good faith and fair dealing; and (3) attorneys' fees. Plaintiff alleges that defendant breached its obligation to use its "commercially reasonable efforts" to obtain approvals for the development plan which constitutes default under the Lease, entitling plaintiff to damages in the amount of $9 million plus attorney's fees. Pending the resolution of the matter, the letters of credit have not been returned to the defendant.

Discussion

When determining the motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Arnav Indus. Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 [2001]). "In assessing a motion under CPLR 3211 (a) (7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." (*Leon v Martinez*, 84 NY2d 83, 84 [1994]). "So liberal is the standard under these provisions that the test is simply whether the proponent of the pleading has a cause of action, not even whether he stated one" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [internal quotation marks omitted]). Applying these standards, the Court addresses each counterclaim/cause of action in turn.

1. Termination as a remedy

Defendant contends that the lease "expressly" provided that plaintiff's sole remedy for Tenant's failure to use commercially reasonable efforts was to be termination of the Lease. The argument is not supported by the language of Article 2 (b) of the Lease. While Article 2 (b) creates a right to terminate the Lease within a narrow time window (ten days) after the Approval Deadline, there is no indication within the section that this termination was intended to serve as a remedy for all possible violations of the contract. Defendant had the right, under the Lease, to terminate upon failure to obtain approvals regardless

of the reasons for the failure and unrelated to any breach, but nothing in the Lease provides that termination during the window period was intended to be the remedy for any and all breaches of the contract. The right to terminate was not linked to whether or not the tenant had used CRE and was not intended solely as a penalty for the failure to use CRE.

In any event, the Lease explicitly provides that "specific remedies granted to Landlord under this Lease are cumulative and are not intended to be exclusive of each other or any other remedies which may be available to Landlord at law or in equity . . . [and] . . . Landlord may exercise any and/or all such rights and remedies . . . without regard to whether the exercise of any such right or remedy precedes, is concurrent with or succeeds the exercise of another such right or remedy." (defendant's exhibit 1, "Additional Remedies" art 19 [c]).

2. Notice to Cure

Paragraph 19 (a) of the Lease lists certain "Events of Default" which trigger a right to termination, re-entry and liquidated damages as described in paragraph 19 (b) of the Lease. Paragraphs 19 (a) (1) and (a) (2) address a failure to pay rent and wrongful assignments. Paragraph 19 (a) (3) is a more generic provision which permits, during the life of the Lease, the Landlord to give notice to the Tenant of a default other than non-payment or wrongful assignment. The Tenant then has thirty days to attempt to cure the noticed default.

Defendant contends that the alleged failure to use CRE was a default which could have been cured and that, without having given notice, plaintiff is prohibited from claiming a breach of the Lease. This argument turns the notice provision on its head. Paragraph 19 (a) (3) by its plain language is not a pre-condition to a claim for breach or damages. Paragraph 19(a) (3) merely provides a mechanism, during Tenant's occupancy, to move to terminate the Lease, evict the Tenant, re-claim possession and sue for liquidated damages roughly equal to lost rents. An uncured Event of Default is a condition precedent for "Termination, Reentry and Damages, Etc." under certain provisions of Paragraph 19 (b) of the Lease, but it is not a substitute for any and all damages which might have been sustained as a result of a breach. Here, plaintiff contends that the failure to use CRE resulted in certain economic injury to plaintiff. Plaintiff does not seek to terminate the Lease or reenter under 19 (b) (3). Plaintiff merely seeks to vindicate whatever contractual or common law rights it may have under Paragraph 19 (c). Once, as

here, the Lease has terminated and Tenant has vacated, the notice to cure provisions have no relevancy to the claim for damages.

The contract here is not unlike that described in *Derry Finance N.V. v Christiana Companies* (797 F2d 1210, 1216 [3d Cir 1986]). In that case, a contract used terms described as "Events of Default" and "default".

Applying New York law which governed the contract, the Third Circuit Court of Appeals looked at both the language and the purpose of the related clauses. The Court found that the capitalization was intended to create a term of art with significance separate and apart from the more generic use of the word "default" by itself. As well, examining the purposes of the clauses, they noted that there, as here, Events of Default carried a notice and cure provision which was intended to trigger a demand for performance and compliance under the contract. The court held that this was not the "functional equivalent" of a default of other provisions of the contract affecting payment.

The analysis is the same here. The Lease created a term of art, Event of Default, which was to be read separately from defaults in general and which term carried a specific meaning and purpose, i.e. failures during occupancy which, if left uncured, permitted termination and reentry.

3. Claims Surviving Termination of the Lease

Defendant argues that none of plaintiff's claims survive the termination of the Lease as of right at the end of the Free Rent Period. However, as previously noted, Article 19 (c) explicitly states otherwise. The Lease provides for common law damages. [1] Moreover, under Article 19 (b) (4), the parties agreed that "Nothing herein contained shall be construed to limit or preclude

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[1] "The specific remedies granted to Landlord under this Lease are cumulative and are not intended to be exclusive of each other or of any other remedies which may be available to Landlord at law or in equity. Landlord may exercise any and/or all such rights and remedies (whether specifically granted herein or otherwise available to Landlord at law or in equity) at such times, in such order, to such extent, and as often, as Landlord deems advisable without regard to whether the exercise of any such right or remedy precedes, is concurrent with or succeeds the exercise of another such right or remedy" (defendant's exhibit 1, art 19 [c]).

recovery by Landlord against Tenant of any sums or damages to which, in addition to the damages particularly provided above, Landlord may lawfully be entitled by reason of any default hereunder on the part of Tenant." Article 2 simply grants Landlord an additional right to terminate regardless of Tenant's performance of its obligations.

4. The Implied Covenant of Good Faith and Fair Dealing

The Lease expressly obligated Tenant to exercise CRE. As such, the breach, if any, is completely circumscribed by the terms of the Lease. The implied covenant of good faith and fair dealing "cannot be construed so broadly as to nullify other express terms of a contract, or to create independent contractual rights" *(Fesseha v TD Waterhouse Investor Serv., Inc.*. 305 AD2d 268, 268 [1st Dept 2003]). Accordingly, the second cause in the complaint is dismissed.

5. Liquidated Damages

As discussed above, failure to use CRE is not an Event of Default under Article 19 and as such, does not trigger the liquidated damages clause in Article 19 (b) (3). Under the common law, while the measure of damages for a landlord whose tenant abandons premises prematurely may be, prima facie, rent reserved "[it] is not applicable where, as here, the damages alleged flow not from a shortfall in the occupancy, but rather from the tenant's alleged failure" to comply with other collateral obligations under the lease. (*Deer Park Enters., LLC v Ail Systems, Inc.*, 57 AD3d 711, 712-713 [2008]).

Article 19 (b) (3) provides for rent due and owing as a measure of damages. In particular, Article 19 (b) (3) (ii) (B) measures damages as "charges . . . which would have been payable by Tenant . . . had this Lease not so terminated." However, by its own terms the article applies only to situations where the termination of the Lease was by reason of default by the Tenant. As discussed above, the termination in this case was not caused by default; it was an election available to either party ten days after the Approval Deadline without regard to fault or breach. Further, there was no rent charged to or due by the Tenant prior to the termination. Accordingly, the so-called liquidated damage provisions of Article 19 (b) (3) do not apply. That is not to say that there are no damages. At this stage of the proceedings it is too early to measure damages, if any. However, it is alleged that the failure to pursue CRE and occupancy by defendant for more than two years caused damage to plaintiff which can be determined at trial.

5. Defendant's Motion for a Preliminary Injunction

Defendant has moved in the alternative for a preliminary injunction prohibiting plaintiff from taking any action "inconsistent with Tenant's ability to develop the property." (defendant's memorandum of law in support of its motion to dismiss, or, in the alternative, for injunctive relief at 22). However, this relief would only apply in the event that the Court held defendant liable to pay rent under Article 19 (b) (3). In light of the ruling above, this "alternative" relief is denied as moot.

Conclusion

Based on the foregoing, it is:

ORDERED, that C&D WEST 14TH STREET LLC's motion to dismiss is denied as to the first and third causes of the complaint, and granted as to the second cause of the complaint

ORDERED, that C&D WEST 14TH STREET LLC is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: October 7, 2010

ENTER:

James A. Yates, J.S.C.