Bistro Shop, LLC v N.Y. Park N. Salem, Inc.
2010 NY Slip Op 34096(U)
January 7, 2010
Supreme Court, New York County
Docket Number: 110907/09
Judge: Bernand J. Fried

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

BISTRO SHOP, LLC and PENNY BRADLEY,

Plaintiffs,

-against-

N.Y. PARK N. SALEM, INC.,

Defendant.

Index No. 110907/09

Appearances:

For Plaintiffs:

David Rozenholc & Associates
400 Madison Avenue, 19th Floor
New York, NY 10017
Gary N. Horowitz, Esq.

For Defendant:

Pavia & Harcourt LLP
600 Madison Avenue, 12th Floor
New York, NY 10022-1653
Jonathan A. Selva, Esq.

Fried, J.:

This case involves a landlord-tenant dispute over a commercial lease, in which the plaintiffs tenant Bistro Shop, LLC ("Bistro" or the "Tenant") and Penny Bradley, a member of Bistro, allege a breach by the defendant landlord N.Y. Park N. Salem, Inc. ('NY Park" or the "Landlord"). Before me is NY Park's motion to compel mediation and arbitration and to dismiss the complaint as to Bradley.

On June 6, 2007, Bistro and NY Park, entered into a lease, expiring on May 31, 2024 (the "Lease"), pursuant to which the Tenant was to operate a restaurant and bar (the "Restaurant") in the premises comprising the ground floor and basement (the "Premises") of the building located at 30 East 60th Street in Manhattan (the "Building"). At the same time, Bradley executed a "Good Guy Guarantee," pursuant to the Lease, guarantying Bistro's performance thereunder (the "Guarantee").

The plaintiffs allege that, during the Lease negotiations, the Landlord represented that it intended to construct up to eight stories on top of the existing Building, which would require significant structural work and approvals from the Metropolitan Transportation Authority ("MTA") and the Department of Buildings ("DOB"). The Landlord's structural plans were annexed as an exhibit to the Lease. The plaintiffs further allege that the Landlord represented that, given the extent of the structural work and its potential to interfere with the opening of the Restaurant, it would be completed in two phases. They assert that they relied on the representations of the Landlord in its assurances with respect to the feasibility of its construction plans and its progress in gaining the required approvals from the MTA and DOB.

Between July and December 2007, Bistro demolished the Premises, in preparation for the construction of its Restaurant, pursuant to the Lease. In particular, Article 43-A of the Lease is entitled "Owner's Work", and Section A provides:

> Owner undertakes to perform [its preparatory work] with all reasonably possible speed. Any change in Owner's [preparatory work] which materially adversely affects the operation of Tenant's business shall require Tenant's consent . . . . Upon delivery of the demised premises to Tenant, Tenant may commence its work to prepare the demised premises for Tenant's intended purpose, including, plumbing, electrical and HVAC work.

The plaintiffs allege that, in March 2008, after beginning construction of the Restaurant, they learned that the Landlord was having difficulty gaining approvals from the MTA, that the Landlord had unilaterally altered its structural plans and was proceeding in one phase, rather than the agreed upon two phases. They further allege, that this change by the Landlord resulted in Bistro being compelled to stop construction on the Restaurant and release its contractor. They assert that, in October 2008, they learned that the Landlord would be essentially starting from scratch in its construction plans

because it had fired its engineer and withdrawn its structural plans, which would require new applications to the MTA and DOB. They allege that, as of July 2009, the Landlord had obtained no government approvals and had commenced no construction work.

The plaintiffs maintain that the Landlord's construction plans were doomed from the start and that the Landlord should have known this at the time of its negotiations of the Lease. Thus, they allege that, during the negotiations leading up to the execution of the Lease, the Landlord made material misrepresentations that induced the Tenant to enter into the Lease and Bradley to enter into the Guarantee. The Tenant asserts that, as a result, it has expended more than $3,000,000 in its efforts to meet its obligations under the Lease. It further asserts that it has suffered the loss of business of the Restaurant, had it timely opened, which it alleges is in excess of $2,700,000.

The plaintiffs brought the instant action in July 2009, asserting six causes of action: breach of contract; breach of covenant of good faith and fair dealing; negligent misrepresentation; rescission of the Lease and the Guarantee; declaratory judgment to the effect that the Lease and Guarantee are null and void and of no effect; and damages.

The Landlord contends that the arbitration provisions contained in the Lease are broad and require that the Tenant's claims be resolved accordingly. The Lease contains two arbitration clauses. First, Article 43-A(C) provides:

> If the restaurant business of the Tenant is interrupted due to Owner's Construction Work, as defined herein, Owner shall reimburse Tenant for the actual costs incurred by Tenant directly attributable to Owner's Construction Work, including Rent. In no event shall Owner otherwise bear any liability to Tenant hereunder with respect to interruption of its restaurant business, including without limitation, if any such interruption arises due to accidents, emergencies, acts of God .... If Tenant claims compensation for any such costs, it shall within forty-five (45) days after such claim shall have arisen send written notice thereof stating in such notice the nature and amount of the costs sustained, together with copies of invoices

and receipts substantiating such costs.

> In no event shall Owner be liable for consequential damages arising out of or relating to Owner's Construction Work, including, damages incurred by Tenant for losses of use, income, profit, financing, business and reputation and for loss of management or employee productivity or of the services of such persons. Tenant shall only be entitled to make a claim hereunder if it is not in material default under the terms hereof, beyond applicable notice and cure periods. In the event of a dispute with respect to the nature or amount of any such claim hereunder, the parties shall submit such dispute to a mutually designated construction professional with a minimum of twenty (20) years experience in New York real estate construction. The parties shall share the cost of compensation of such professional. If the parties cannot agree on the designation of such a professional nor agree to accept the professional's determination as final, they shall submit such dispute to arbitration in New York, New York under the Commercial Rules and Expedited Procedures of the American Arbitration Association. The award may be enforced by any court having jurisdiction thereof.

Second, Article 60(F) contains an arbitration clause that is activated if the Tenant and the Landlord are unable to resolve a dispute concerning the Landlord's determination of "fair market rent" for a renewal term. The clause provides the specific arbitration procedures necessary for the resolution of such a dispute.[1]

Thus, by its motion, the Landlord moves to compel the Tenant to submit to mediation and arbitration. It further seeks to dismiss Bradley's claims on the basis that she has no claims arising out of the Guarantee.

Turning first to the prong of the motion which seeks to compel mediation and arbitration. CPLR 7503(a) provides that "[a] party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." The first question to ask when dealing with an arbitration clause between two parties is "whether the dispute is arbitrable, which can embrace such constituent issues

---

[1] The clause requires that these procedures be consistent with the American Arbitration Association's "real estate valuation arbitration rules." (Lease, art. 60[F][i]).

as whether a valid agreement to arbitrate was made and complied with or whether, if the arbitration clause is a narrow one, the particular dispute is within it." (Siegel, NY Prac § 589 [4th ed] citing CPLR 7503[a]). "If [the clause] is narrow, which evinced an intent not to have arbitration resolve everything, i.e., it shows an intent to restrict arbitration to stated issues, satisfaction of a condition precedent will usually be for the court to decide." (*Id.*). "Arbitration and other alternative procedures for resolving disputes are creatures of contract, and while the law favors such alternatives to litigation, a party will not be denied judicial resolution of a controversy unless it falls within the governing ADR provision." (*FCI Group, Inc. v City of New York*, 54 AD3d 171, 175 [1st Dep't 2008]).

The plaintiffs contend that the first arbitration clause, contained in Article 43-A(C) of the Lease, is narrow and limited to the specific instance of the Tenant's claim for business interruption "due to Owner's Construction Work." They argue that the clause requires the existence of two conditions precedent that have not yet been satisfied. I agree. First, the Tenant must have an operational business before any such business interruption can occur. Second, the Landlord must have begun its construction work in order for such work to interrupt the Tenant's business. In addition, the definition of the term "Owner's Construction Work" is unclear because it is defined nowhere in the Lease. From a reasonable reading of the clause, it is limited to business interruption. For the reasons explained, I do not find that it mandates sending this action to mediation or arbitration. The Tenant has no operational business that could have been interrupted by the Landlord's yet-to-begin construction work.

As for the second arbitration clause, contained in Article 60(F) of the Lease, the plaintiffs correctly argue that its scope is limited to governing the resolution of a dispute between the Tenant

and the Landlord over the latter's determination of "fair market rent" for a renewal term. Here, no such dispute is at issue.

Therefore, neither of the Lease's two arbitration clauses pertains to the relief requested by the Landlord, which would require the Tenant to submit to mediation and arbitration. The two clauses are very limited in scope to circumstances that are not currently at issue. Thus, I decline to send this action to mediation or arbitration.

I now turn to that prong of the motion which seeks to dismiss the complaint as to Bradley, pursuant to CPLR 3211, on the grounds that she has no standing to bring a cause of action.

On a motion to dismiss made pursuant to CPLR 3211, the complaint "is to be afforded a liberal construction," and the plaintiff is afforded the "benefit of every possible favorable inference." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Specifically, under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Id.* at 88, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

It is well settled that "[f]or a wrong against a corporation a shareholder has no individual cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation." (*Abrams v Donati*, 66 NY2d 951, 953 1985]). A shareholder may bring an derivative suit on behalf of a corporation, "but has no standing to sue in his individual capacity." (*Lamberti v 30 Real Estate Corp.*, 8 AD3d 211, 212 [1st Dep't 2004]).

As a member of Bistro, a limited liability company,[2] it is undisputed that Bradley is a

---

[2] "The Limited Liability Company Law is a hybrid of the corporate and limited partnership forms, offering the tax benefits and operating flexibility of a limited partnership with the limited liability protection a corporation provides." (*Tzolis v Wolff*, 39 AD3d 138, 143 [1st Dep't 2007]).

shareholder. (*See* 11/16/09 Tr, at 10-11). In the complaint, Bradley joins the Tenant in four of the six causes of action against the Landlord: negligent misrepresentation, rescission of the Guarantee, declaratory judgment and damages. Bradley's causes of action are based on the theory that she has been injured as a result of the alleged material misrepresentations made by the Landlord. However, as a shareholder, Bradley has no standing to bring such claims. Rather, such claims belong solely to the Tenant. (*See Abrams*, 66 NY2d at 953; *Lamberti*, 8 AD3d at 212).

Bradley's standing to bring a claim against the Landlord is limited to her capacity as the guarantor of Bistro's performance under the Lease, pursuant to the Guarantee. However, the Landlord admits that it has made no claims against Bistro based on its performance under the Lease, nor has it made any claims against Bradley as the guarantor. (*See* 11/16/09 Tr, at 4). Here, Bradley's obligations under the Guarantee are not at issue. Thus, her claims against the Landlord must be dismissed.

Accordingly, it is

ORDERED that the prong of NY Park's motion that seeks to compel mediation and arbitration is denied; and it is further

ORDERED that the prong of NY Park's motion that seeks to dismiss the complaint as to Bradley is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 7, 2010

FILED
Jan 11 2010
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

J.S.C.

HON. BERNARD J. FRIED