

Matter of Ladies Mile, Inc. v Diamond

2011 NY Slip Op 31531(U)

June 6, 2011

Sup Ct, NY County

Docket Number: 111368/2004

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C.

PART 2

Ludie's rule

- v -

Aydan, D

INDEX NO. 111 368/04
MOTION DATE _____
MOTION SEQ. NO. 011
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 *is decided in accordance with the accompanying decision*

FILED

JUN 09 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 6/6/11

Ley
LOUIS B. YORK 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 : IAS PART 2

-----X
In The Matter of the Application of

LADIES MILE, INC.,
Plaintiff,
-against-

Index No. 111368/2004

AYTAN DIAMOND,
Defendant.

FILED

JUN 09 2011

-----X
LOUIS B. YORK, J.S.C.:

The underlying facts in this action are as follows: **NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff is the successor to Apache Real Estate Holdings Corp., the prior owner and landlord of the Building at 655 6th Avenue, New York, New York, 10011. Apache was the successor to the Hugh O'Neill Building Co., which was the owner and landlord of the Building prior to Apache. In 1978, defendant Aytan Diamond began his tenancy at 655 6th Avenue in room 415 where he used the rental space for both residential and work purposes; he remained in room 415 until October 6, 1987 when, pursuant to an agreement with the Hugh O'Neill Building Co., he agreed to relocate to room 212 and a portion of the basement. The non-commercial working component of defendant's unit was located in the basement space and the residential component was located in the second floor space. After defendant vacated and surrendered the Fourth Floor Premises and relocated to room 212 and the basement space, O'Neill demolished the entire fourth floor in the Building and reconstructed it as commercial office space.

Pursuant to an agreement dated September 10, 1996 with the Hugh O'Neill Building Co. ("O'Neil"), defendant agreed to irrevocably surrender his current basement

space in exchange for the right to occupy adjacent space in the basement ("new basement space"). According to paragraph 6 of the agreement, O'Neill was obligated to prepare the new basement space for defendant by:

- (i) providing demising walls, an entry door which shall be a double door with locks, an electrical panel and, as depicted in the attached diagram, a hallway leading from the freight elevator to the new basement space (collectively, the "installations") all of which shall be at least comparable quality to those existing in the old basement space on the date of this agreement, (ii) removing or raising the three ceiling pipes depicted on the attached diagram (iii) repairing any holes in the floor of the new basement space and (iv) providing such mechanical ventilation in the new basement space as shall be required by law.

According to paragraph 7 of the agreement, "O'Neill, as owner, agreed to complete the installations no later than 180 days from the date all applicable permits and licenses [were] obtained." The 1996 agreement was silent as to when O'Neill needed to obtain the necessary permits to prepare the new basement space.

During the period between the execution of the 1996 agreement and the issuance of the NYC Department of Buildings Permit on March 31, 1998, defendant continued to operate his woodworking shop from within the old basement space without interruption. The NYC Department of Buildings Permit authorized the construction of "New Interior Partitions, Fixtures and Finishes, New Metal Stairway to Cellar Storage Area." As stated, paragraph 7 of the 1996 agreement gave the owners 180 days from the date of the final installation permit to complete the installations. Therefore, as the permit was issued on March 31, 1998, the owners had until September 27, 1998 to complete installations. These installations were completed in advance of the deadline, in May 1998, when the new basement space was ready for occupancy.

In addition to the installations, there was an issue with the certificate of

occupancy. Under the 1990 certificate of occupancy the basement space was to be used only for accessory storage and for the placement of a boiler room. Paragraphs 5 and 6 of the 1996 agreement obligated O'Neill to use reasonable efforts to obtain an amended certificate of occupancy to permit a woodworking shop in the basement of the building. Also under the agreement, O'Neill had to file the application within 30 days of the vacatur date. Both parties agree that "the vacatur date" was 60 days after the basement space was ready for occupancy by defendant. As the new basement space was ready for occupancy in May, the vacatur date was July 1998. Thus, the owner had until 30 days after that, or August 1998, to file the application to amend the certificate of occupancy. O'Neill pre-filed the application with the NYC Department of Buildings on July 30, 1998 and filed it on August 3, 1998. The NYC Department of Buildings issued a permit on February 18, 1999 to obtain an amended certificate of occupancy for the cellar and to perform minor partition work for mechanical ventilation, uncovering of existing exterior grille, and ventilation system for shop.

On March 31, 1999, the Department of Buildings inspected the basement and issued a Certificate of Occupancy Inspection Report Form, which identified eight objections to the issuance of an amended certificate of occupancy, including items of work which plaintiff had to complete in order to amend the certificate of occupancy. The most relevant objection at present is plaintiff had to install fire-rated Sheetrock on ceilings in the basement. O'Neill's architect sent a letter on April 1, 1999 to Amy C. Kika, the managing agent for the building at the time, which identified certain work items that had to be addressed in order to apply for an approval from the Department of Buildings' inspector. In order to acquire the amended certificate of occupancy, O'Neill

requested and obtained proposals to perform the work on August 18, 1999, including a proposal from A&W Systems, Inc. for the installation of a fire rated ceiling. Plaintiff states that the predecessor owner, Apache, engaged a contractor to perform the work.

In order to install the Sheetrock in the basement, plaintiff had to obtain access to the space. According to the complaint, in 2001 Defendant denied Apache access to his space. Plaintiff further asserts that due to this denial of access, plaintiff could not complete the work and therefore could not obtain an amended certificate of occupancy.

Because of the delay due to the denial of access, plaintiff asserts, Apache's initial work permit lapsed and it had to request permission to reinstate the application. Apache filed this request on June 12, 2004. However, between the time the parties entered into the 1996 agreement and the time of this application, circumstances had changed. In 1996, the basement was located in an M1-5M zone, which permitted carpentry, custom woodworking or custom furniture-making shops. On September 9, 1999, however, the applicable New York City Zoning Resolution was amended and the zone was changed from an M1-5M zone to a C6-3A zone, which does not permit carpentry, custom woodworking or custom furniture-making shops. Therefore, the space can no longer be used for a non-retail cabinetry shop or for woodworking purposes. Accordingly, the request to reinstate the application was denied.

Despite this, according to plaintiff, defendant continues to use the space for cabinet-making and woodworking, in violation of the 1990 Certificate of Occupancy and of the Zoning Resolution. Plaintiff asserts that in 2004 it received a Notice of Violation and Hearing based on defendant's noncompliance, demanding that the illegal use stop by August 25, 2004. Plaintiff alleges it could not get defendant to stop using the space

as his woodworking shop. Accordingly, in early August 2004 plaintiff initiated this action, seeking: 1) in its first cause of action, a declaration that defendant's use of the space violated the zoning law and the certificate of occupancy; 2) in its second and third causes of action, a judgment of ejectment; and 3) in its fourth cause of action, a permanent injunction.¹

Defendant filed an answer to the complaint -- and an amended answer to the amended complaint -- and also asserted four counterclaims.² Defendant's first counterclaim is for breach of contract of the 1987 and 1996 agreements. According to defendant plaintiff's predecessor breached its agreement with defendant by failing to obtain an amended certificate of occupancy legalizing defendant's use of the basement space. Defendant's second counterclaim seeks an order which reforms the parties' agreements; defendant would have the agreement require plaintiff to amend the building's certificate of occupancy so that it permits defendant to use his leased basement space for residential purposes, as an adjunct to his second floor apartment. Defendant's third counterclaim seeks rescission in the form of an order restoring him to possession of the Fourth Floor premises. Defendant claims that plaintiff and its predecessors negligently and/or intentionally failed to perform their obligations under the agreements and now it potentially is impossible for plaintiff to perform. Accordingly,

¹ Plaintiff has annexed the amended complaint, upon which the Court relies.

² Neither party has provided the amended answer, although plaintiff has submitted the original answer. As the motion and cross-motion relate to the counterclaims only, the court does not find plaintiff's omission fatal. However, plaintiff's counsel should take care to provide up-to-date copies of both sets of pleadings in the future, rather than providing accurate copies of its own pleadings alone.

defendant seeks to rescind the agreements and restore defendant to the *status quo ante*. Defendant's fourth and final counterclaim is for attorney's fees, as the parties' January 12, 200 agreement provides for legal fees to the prevailing party in any litigation relating to the lease.

Justice Tolub, who originally presided over this action, issued several orders which preliminarily and then permanently enjoined defendant from using the basement space as a cabinetry shop and dismissed all of the causes of action in the complaint as moot. Only defendant's counterclaims remain active at this time.

Analysis

Plaintiff currently moves for an order granting summary judgment dismissing defendant's counterclaims and thus disposing of the case. Defendant opposes the motion and cross-moves for summary judgment on the first, second and fourth counterclaims. For the reasons below, the court grants the motion, dismissing the counterclaims, and denies the cross-motion.

I. The first counterclaim.

Plaintiff argues that the first counterclaim, which asserts that plaintiff and its predecessors breached their obligations under the 1987 and 1996 agreements, should be dismissed on several bases. To the extent that defendant asserts a breach of the 1987 agreement, plaintiff argues that the claim is barred by the statute of limitations. In addition, plaintiff cites paragraph 1(b) of the 1987 agreement, which includes an arbitration clause. Plaintiff further notes that, paragraph 22 of the 1996 agreement released both plaintiff and the building's owner from all prior claims relating to plaintiff's occupancy at the building, and that paragraph 24 expressly states that the 1996

agreement supercedes all prior agreements. Plaintiff contends that due to the these clauses, defendant may not maintain a breach of contract claim premised upon the 1987 agreement. See Hack v. United Capital Corp., 247 A.D.2d 300, 301, 669 N.Y.S.2d 280, 281 (1st Dep't 1998)(regarding impact of release). Defendant does not challenge this argument in his cross motion, and plaintiff has shown that any claims based on the 1987 agreement should be dismissed. Therefore, the portion of the first counterclaim which relies on the 1987 agreement is dismissed.

As for the alleged breach of the 1996 agreement, plaintiff contends that defendant has misread the contract. According to the counterclaim, plaintiff's predecessor agreed to legalize the new portion of the basement by obtaining an amended certificate of occupancy to permit the home occupation use. However, as plaintiff points out, Paragraph 5(a) of the 1996 agreement states in pertinent part:

Owner shall use reasonable efforts to amend the certificate of occupancy of the building, if required, by filing an application no later than 30 days after the Vacatur Date to permit the use of the New Basement Space for the fabrication of wood items as may be permitted by Section 32-00(B) of the New York City Zoning Resolution.

Thus, on its face, the agreement requires plaintiff to (1) use "reasonable efforts" to obtain the amendment and (2) apply for the amendment within 30 days of the vacatur date. The parties agree in their papers that the vacatur date was 60 days from the delivery of the space to defendant.

Plaintiff alleges that it complied with these conditions. O'Neill, the prior owner, allegedly built out the space and delivered possession to defendant in May, 1998. The vacatur date, therefore, was in July 1998. Thus, according to paragraph 5(a) of the 1996 agreement, plaintiff had until August 1998 (30 days after the vacatur date) to file

the application with the Department of Buildings. Plaintiff puts forth evidence that the application was executed on July 2, 1998 and was subsequently filed on August 3, 1998. Based on these facts, plaintiff complied with the obligations pursuant to the 1996 agreement. Defendant's first counterclaim fails to establish a material breach of the 1996 agreement and summary judgment is granted in favor of plaintiff. See ALJ Capital I, L.P. v. David J. Joseph Co., 2007 N.Y. Slip Op 50867U *4, 841 N.Y.S.2d 217 (N.Y. Misc., March 13, 2007) (inability to establish all of the required elements for sustaining a breach of contract claim warrants summary judgment dismissing claim).

Moreover, defendant's arguments to the contrary are unpersuasive. He claims that O'Neill delayed unreasonably in preparing the basement for possession, but points to no provision requiring it to proceed any faster. Defendant also alleges that O'Neill violated paragraph 7 of the agreement, which required it to complete all installations within 180 days of the date it obtained the required permits. However, plaintiff performed the work within 180 days of March 31, 1998, when it obtained these permits. As plaintiff further notes, through the affidavit of Ms. Kika, the contract did not require the owner to obtain the permits within a particular period of time, and defendant did not complain about the owner's purported delay in applying for the permits. Defendant's argument that plaintiff was required not only to apply for but to succeed in obtaining an amended certificate of occupancy lacks merit, as plaintiff had no power to control the Department of Buildings' determination. Defendant's statement that plaintiff had notice of the proposed zoning changes in advance of the events in question does not comport with the time line of these events. Plaintiff applied to amend the certificate of occupancy in August 1998, in advance of the alleged March 1999 notice, received

permission to amend on February 18, 1999, also in advance of this notice, and received from the Department of Buildings a certificate of occupancy report form which listed eight objections to the application on March 31, 1999 and apparently did not inform the parties that the proposed use may become impermissible. Defendant's additional contentions similarly lack merit, are contradicted by the affidavit of Ms. Kika and/or by the documentary evidence, and are unsupported by any legal arguments. Finally, as plaintiff notes, the change in zoning for the building, rather than plaintiff's conduct, render it impossible for defendant to operate his woodworking shop in the basement.

II. The second counterclaim.

Defendant's second counterclaim seeks to reform the 1996 agreement so that plaintiff is obligated to amend the certificate of occupancy for the building to permit defendant to use the basement portion of his space as an adjunct to the residential use which is carried on in the room 212 portion of defendant's premises. Defendant claims that as a result of plaintiff's breach of the 1996 agreement to legalize the use of the basement as a cabinetry shop, plaintiff must now seek to legalize the basement space as accessory space to the second floor portion of the dwelling unit. Plaintiff counters that the agreement fails to provide for reformation as a remedy in the event that the owner could not obtain an amended certificate, and thus defendant is not entitled to reformation.

The 1996 agreement does not provide reformation as a remedy in the event the owner could not obtain an amended certificate of occupancy. Reformation of a written instrument is available where, because of a mutual mistake of fact, the instrument fails to express the real agreement between the parties. Speranza v. Repro Lab Inc., 62

A.D.3d 49, 54, 875 N.Y.S.2d 449, 453 (1st Dep't 2009). A mere allegation that plaintiff breached a contractual obligation is not sufficient to obtain the equitable remedy of reformation. See Chimart Associates v. Paul, 66 N.Y.2d 570, 498 N.Y.S.2d 344 (1986) ("Procedurally, there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties). Because there are no allegations of fraud in this case, defendant must establish that the 1996 agreement fails to express the true agreement of the parties due to mutual mistake. However, reformation based upon mistake is not available where the parties purposely contract based upon uncertain or contingent events. Id. at 574. Here, because the 1996 agreement was based upon the uncertain or contingent event of whether the amended certificate of occupancy would be obtained defendant may not seek reformation based upon mistake. The equitable remedy of reformation is unavailable to defendant in this case and summary judgment is granted in favor of plaintiff as to defendant's second counterclaim.

It is unclear from the papers, however, whether defendant still occupies the space and how much of his rent is attributable to it. At some point, according to a decision issued by Justice Tolub, defendant used the space as a storage room only. Defendant's October 27, 2005 affidavit also states that he used the space for ancillary storage.

III. The third counterclaim.

With the third counterclaim, defendant seeks to rescind both the 1987 and 1996 agreements and restore him to possession of room 415 in the subject building. Defendant asserts that the negligent and/or intentional failure of plaintiff and its

predecessors to perform their obligations under the subject agreements, coupled with the current impossibility of performance due to the zoning change, entitle defendant to this relief. Plaintiff counters that it is impossible to return the fourth floor premises to the *status quo ante* because of renovations completed more than twenty years ago. In particular, the fourth floor was converted to condominium units, all of which have been sold.

The equitable remedy of rescission is available only where a party lacks a complete and adequate remedy at law and where the *status quo* may be substantially restored. See Sirico v. F.G.G. Productions, Inc., 71 A.D.3d 429, 435, 891 N.Y.S.2d 61, 66 (1st Dep't 2010); Federal Ins. v. Kozlowski, 18 A.D.3d 33, 40, 792 N.Y.S.2d 397, 402 (1st Dep't 2005). The parties have not provided the Court with useful or particularly analogous cases.³ However, the Court located a Second Department decision which upheld a jury's decision not to rescind a contract due to zoning changes where "the zoning changes that ultimately affected the subject property were not under consideration at the time that [the parties entered into the contract] and . . . the [zoning] changes were not directed at the plaintiff or the subject property specifically" Tepedino v. City of Long Beach, 226 A.D.2d 446, 446, 640 N.Y.S.2d 591, 592 (2nd Dep't 1996). Moreover, although defendant has alleged that plaintiff unduly delayed in making the requisite renovations and seeking the amendment to the certificate of occupancy, his arguments are unpersuasive. See supra at pp. 8-9.

³ Moreover, defendant has not provided legal citations or arguments to support any of his arguments.

In addition, as stated, to award rescission the Court must be able to restore the status quo. Here, the fourth floor has long since been demolished and re-configured. None of the original partitions or layouts of the offices remain, and the 10 new condominium units – all of which have been purchased and are inhabited – were constructed with entirely different floor plans. Therefore, rescission is not possible. See Rudman v. Cowles Communications, Inc., 30 N.Y.2d 1, 13-14, 330 N.Y.S.2d 33 (1972); Singh v. Carrington, 18 A.D.3d 855, 857, 796 N.Y.S.2d 668, 670 (2nd Dep't 2005). Accordingly, the court grants plaintiff's motion and denies defendant's cross-motion with respect to the third counterclaim.

Despite the fact that the Court dismisses this counterclaim, it sympathizes with defendant, who apparently still pays rent for a space which he can no longer use, except possibly as a storage unit. The Court hopes the parties will work together to reach a more equitable solution, perhaps restructuring the lease so that (1) defendant relinquishes the basement space and plaintiff reduces his rent proportionately, or (2) plaintiff allows defendant to make reasonable use of the space.

IV. The fourth counterclaim.

Defendant's fourth counterclaim seeks an award of legal fees by virtue of the agreement dated January 12, 2000, between defendant and plaintiff's predecessor.

Paragraph 3 of that agreement states in pertinent part:

In the event of any future litigation between Diamond and/or Krifka and owner (including without limitation the restoration of the harassment application or any proceeding) asserting diminution of services and/or harassment or for breach of this agreement, the losing party shall pay the reasonable legal and other professional fees and expenses of the prevailing party.

Defendant claims that the court should grant summary judgment as to all counterclaims and in so doing he is the prevailing party. Upon granting summary judgment in favor of plaintiff on defendant's first, second, and third counterclaims, this Court dismisses defendant's claim for attorney's fees and awards plaintiff its attorney's fees as the prevailing party herein. See Town House Stock LLC v. Coby Hous. Corp., 49 A.D.3d 456, 855 N.Y.S.2d 55 (1st Dep't 2008) (Plaintiffs sustained their burden of establishing that they were entitled to judgment as a matter of law involving the breach of a 2006 settlement agreement; the court properly awarded interest and prevailing-party attorneys' fees to plaintiff since the action was premised upon a breach of the 2006 settlement agreement).

Conclusion

Based on the reasons set forth above, it is

ORDERED that plaintiff's motion for summary judgment against all of defendant's counterclaims is granted; and, it is further

ORDERED that defendant's cross motion is denied; and it is further

ORDERED that, as the remaining claims in this action have been resolved by the motion, the action is dismissed.

ENTER:

Dated: 6/6/11

FILED

JUN 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

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Louis B. York, J.S.C.

**LOUIS B. YORK
J.S.C.**