

307 Canal St. Ltd. v Omnipoint Communications

2011 NY Slip Op 32925(U)

October 18, 2011

Sup Ct, NY County

Docket Number: 102805/10

Judge: Joan A. Madden

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11-4-11
cc

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

PRESENT: Hon. Joan A. Wadden

PART 11

Index Number : 102805/2010

307 CANAL STREET

vs

OMNIPOINT

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

FILED

NOV 07 2011

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: _____

Joan A. Wadden

[Signature]

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 11

-----X
307 CANAL STREET LTD.,
Plaintiff,

-against-

OMNIPOINT COMMUNICATIONS d.b.a.
T-MOBILE USA, INC.,
Defendant.

Index No. 102805/10

FILED

NOV 07 2011

-----X
Joan A. Madden, J.

NEW YORK
COUNTY CLERK'S OFFICE

In this action arising out of the alleged breach of a commercial lease, defendant Omnipoint Communications d.b.a. T-Mobile USA, Inc. ("T-Mobile") moves for summary judgment dismissing the complaint against it. Plaintiff 307 Canal Street Ltd. ("307 Canal") opposes the motion and argues that it is entitled to summary judgment¹.

Background

Plaintiff 307 Canal was the owner of premises located at 307 Canal Street, New York, New York (the "Premises"), which includes a ground floor store and basement. On or around June 14, 2004, 307 Canal, as landlord, and T-Mobile, as tenant, entered into a commercial lease agreement (the "Lease") for the Premises.

307 Canal alleges that during the term of the Lease, T-Mobile breached its obligations under the Lease by creating building conditions that caused the New York City Landmarks Preservation Commission (the "LPC") to issue at least three separate warning letters (the "Warning Letters") to 307 Canal citing violations of the Landmarks Law under New York City

¹While 307 Canal and T-Mobile referred to 307 Canal's cross motion for summary judgment, it appears that 307 Canal failed to official cross move for summary judgment. Nonetheless, as T-Mobile is on notice of 307 Canal's request for such relief that court will consider it.

Administrative Code §§25-305 and 25-310 at the Premises. In this connection, 307 Canal notes that under Paragraph 44B of the Lease, T-Mobile was required to comply with:

“all laws, orders, ordinances and rules and regulations of each and every Department and Bureau of the City and State of New York and of the United States of America.... [T-Mobile] shall reimburse [307 Canal] for any expense incurred on account of the failure of [T-Mobile] to comply with any of such requirements.”

The LPC asserted violations against the Premises for (i) alterations to the Howard Street ground floor entrance without permit(s), (ii) “[r]eplacement of entrance infill at easternmost Canal Street ground floor bay without [permit(s)],” and (iii) “[i]nstallation of signage at Canal Street without [permit(s)].” According to 307 Canal, the Warning Letter related to the Howard Street alterations resulted in a Notice of Violation on November 14, 2005. 307 Canal asserts that T-Mobile was notified of these violations and attempted to cure them, but failed to satisfactorily address all the violations.

By letter dated September 21, 2006, 307 Canal advised T-Mobile that it was in default of its Lease obligations by virtue of its failure to address the violations of the Landmarks Law cited in the Warning Letters. Under Paragraph 19 of the Lease, 307 Canal had the option of performing T-Mobile’s Lease obligations in the event of default by T-Mobile, and then subsequently instituting an action against T-Mobile to recoup its expenses, including attorneys’ fees, as additional rent or, after the expiration of the Lease, as damages.²

² Paragraph 19 provides: “If [T-Mobile] shall default in the observance or performance of any term or covenant on [T-Mobile’s] part... [, 307 Canal may (subject to certain other Lease provisions] perform the obligation of [T-Mobile]...and if [307 Canal]...makes any expenditures or incurs any obligation for the payment of money[,] including but not limited to reasonable [attorneys’] fees...in instituting [an action against T-Mobile for payment, then, if 307 Canal is the prevailing party, such sums shall be recoverable by 307 Canal as additional rent during the Lease term or, following the expiration of the Lease, as damages].

On January 26, 2009, T-Mobile gave 307 Canal eight months' written notice of its intent to terminate the Lease and a check in the amount of \$190,000.00 (the "Termination Fee") as per Paragraph 58 of the Lease. Paragraph 58 states that:

Provided [T-Mobile] is not then in default hereunder; [T-Mobile] shall have the one (1) time right to terminate this Lease at the end of five years on eight (8) months prior written notice. [T-Mobile] shall be entitled then to have the lease terminated prior to the sixty-first month of the [L]ease and have no further liability for payment of rent, provided [that T-Mobile] reimburses [307 Canal] for: 1) ...[a certain] Rent Credit..., 2) ... [certain designated] brokerage commissions ... and 3) a termination payment in the sum of \$25,000.00. The total payment due from [T-Mobile] to [307 Canal] in order to exercise this right to terminate is \$190,000.00.

It is undisputed that T-Mobile accepted and cashed the check without any protest, condition, restrictive endorsement or reservation of rights. On September 30, 2009, T-Mobile vacated the Premises.

On or about March 4, 2010, 307 Canal filed a summons and complaint against T-Mobile. 307 Canal alleges that T-Mobile conducted renovations that were non-compliant with the Landmarks Law and failed to timely and satisfactorily correct the non-compliant conditions in violation of its obligations under the Lease, causing damages to 307 Canal in the amount of \$250,000.00. 307 Canal asserts that it incurred damages as a result of T-Mobile's breach of its Lease obligations as 307 Canal was required to undertake the work necessary to correct the Landmark Law violations, and 307 Canal lost certain privileges and immunities pertaining to the Premises. 307 Canal also asserts claims negligence, unpaid real estate taxes, and legal fees; however, 307 Canal acknowledges in its response to T-Mobile's interrogatories that the claim for unpaid real estate taxes has been satisfied.

In its answer, T-Mobile issues a general denial of 307 Canal's allegations and asserts defenses that: (1) 307 Canal failed to state a cause of action, (2) 307 Canal's claims are barred by the doctrine of accord and satisfaction based upon its acceptance of the Termination Fee, (3) 307

Canal's claims are barred by the doctrines of mutual mistake, impracticability, and frustration of purpose, (4) any damages incurred by 307 Canal were the result of "third parties or [307 Canal] itself over whom T-Mobile had no control," (5) 307 Canal's claims are barred by the doctrines of waiver and estoppel, (6) 307 Canal's claims are barred by the doctrine of laches, (7) the damages sought by 307 Canal are "remote, speculative, contingent, unreasonable, duplicative, and not legally cognizable," and (8) T-Mobile has paid the amounts sought by 307 Canal in its complaint in full or in part.

T-Mobile now seeks summary judgment dismissing the complaint against it, arguing that since 307 Canal was aware of the non-compliant conditions cited in the Warning Letters and accepted, without any reservation of rights, the Termination Fee paid pursuant to Paragraph 58 of the Lease, which provides that T-Mobile is entitled to terminate the Lease under that Paragraph if T-Mobile is not in default, it waived its right to seek damages relating to these conditions. T-Mobile also argues that an early termination fee, such as the one at issue here, is tantamount to a liquidated damages clause, and 307 Canal's acceptance of the Termination Fee bars it from claiming further damages. Additionally, T-Mobile argues that 307 Canal may not accept the benefit of the Termination Fee under Paragraph 58 without being deemed to have acknowledged that T-Mobile was not then in default under the Lease. T-Mobile also argues that 307 Canal's acceptance of the Termination Fee, without reservation of rights, operates as an accord and satisfaction.

T-Mobile further asserts that the causes of action for breach of contract relating to the Landmarks Law violations must be dismissed as T-Mobile has failed to provide evidence of any loss or expense that it incurred in addressing the issues raised in the Warning Letters and has failed to provide a satisfactory explanation for the basis of its claimed damages in its Answers to

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Interrogatories, stating only that the “actual costs, expenses and legal fees... have yet to be determined.” Answers to Interrogatories at ¶11.

T-Mobile further asserts that summary judgment on the claim for real estate taxes is appropriate since 307 Canal acknowledges that it has been paid in full. T-Mobile also argues that 307 Canal’s cause of action for attorneys’ fees must be dismissed since T-Mobile is only entitled to attorneys’ fees under Paragraph 19 if it prevails in an action or proceeding, and 307 Canal should not prevail here.

In its opposition, 307 Canal submits the affidavit of Anthony Michaels (“Michaels”) who is 307 Canal’s Agent and its manager in dealing with the violations of the Landmarks Law on the Premises. Michaels states that 307 Canal did not waive any rights it had under the Lease by accepting the Termination Fee, nor did it accept the payment of the Termination Fee in satisfaction of T-Mobile’s obligations. In this connection, Michaels notes that the Lease provides that “...no provision of this [L]ease shall be deemed to have been waived by [307 Canal] unless such waiver [be] in ... writing signed by [307 Canal] (emphasis omitted).” Lease, Paragraph 24.

According to Michaels, the purpose of the Termination Fee is, by the terms of the Lease, a reimbursement for “the costs and concessions made at the outset of the [L]ease and payment for costs of termination.” Michaels Aff. at ¶17. Michaels states that there was never any discussion that the Termination Fee would release T-Mobile from any defaults in its Lease obligations and that the amount of damages that T-Mobile had caused at the time the Termination Fee was paid could not yet be ascertained. Id. at ¶¶18-19. Michaels also notes that after the Termination Fee was paid, T-Mobile requested the right to assign the Lease to another entity, and 307 Canal denied this request based on T-Mobile’s default. In support of this

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material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

It is well settled that the interpretation of a lease provision is governed by the same rules of construction applicable to other agreements. Missionary Sisters of the Sacred Heart v. New York State Division of Housing & Community Renewal, 283 A.D.2d 284, 288 (1st Dept 2001); New York Overnight Partners, L.P. v. Gordon, 217 A.D.2d 20 (1st Dept 1995), aff'd 88 N.Y.2d 716 (1996). When interpreting a contract, “the document must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized.” Snug Harbor Square Venture v. Never Home Laundry, 252 A.D.2d 520, 521 (2nd Dept 1998); see also Zodiac Enterprises, Inc. v. American Broadcasting Companies, Inc., 81 A.D.2d 337, 339 (1st Dep't 1981), aff'd, 56 N.Y.2d 738 (1982).

At the same time, however, “a court may not, under the guise of interpretation, fashion a new contract for the parties by adding or excising terms and conditions which would contradict the clearly expressed language of the contract (citation omitted).” Republic National Bank of New York v. Olshin Woolen Co., Inc., 304 A.D.2d 401 (1st Dept 2003). Thus, when the terms of a contract are “clear, unequivocal and unambiguous, the contract is to be interpreted by its own language (citations omitted).” R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29, 32 (2002). And, in the absence of ambiguity, “[e]vidence outside the four corners of the document ... is generally inadmissible to add to or vary the writing.” Id. at 33, quoting W.W.W. Assoc. v Giancontieri, 77 N.Y.2d 157 (1990).

Here, contrary to T-Mobile's position, the Lease cannot be interpreted to find that 307 Canal waived any defaults by T-Mobile when it permitted T-Mobile to terminate the Lease.

stipulating liquidated damages for a breach of contract must be express and unambiguous. City of Elmira v Larry Walter, Inc., 76 N.Y.2d 912 (1990); X.L.Q. Concrete Corp. v Brady & Co., 104 A.D.2d 181 (1st Dept 1984). In this case, Paragraph 58 does not evidence any intention, express or otherwise, to be a measure of damages for T-Mobile's breach of the Lease.

Furthermore, T-Mobile's argument for dismissal based on 307 Canal's alleged failure to offer proof of damages resulting from the alleged Landmarks Law violations is unavailing. First, 307 Canal submits evidence of the expenses incurred thus far in curing the violations. Specifically, Michaels states in his affidavit that 307 Canal has incurred expenses of \$22,600 in fees owed to him as manager in dealing with the violations and attaches invoices supporting this assertion.³ Michael Aff. at ¶28. In addition, Michaels states that 307 Canal has expended \$15,607.85 for architectural services and will incur \$4,300 in additional fees for permits and related services. *Id.* at ¶27. In support of these statements, Michaels attaches invoices related to these services.⁴ Michaels also states that 307 Canal has received estimates that it will cost \$166,497.00 to cure T-Mobile's violations of the Landmarks Law and that T-Mobile will also be liable to 307 Canal for legal fees under Paragraph 19 of the Lease.

As 307 Canal has not waived its right to damages and as T-Mobile does not deny that it breached the Lease by violating the Landmarks Law, 307 Canal is entitled to summary judgment as to liability on its causes of action for breach of contract and for legal fees based on such breach. See CPLR 3212(b).

³ The Exhibit which Michaels references as proof of these fees appears to be Exhibit 6 rather than Exhibit 5, and it appears from Exhibit 6 that Michaels is owed \$22,647.60.

⁴ The submissions of "proof" of the claimed fees and expenses, other than those claimed to be owed to Michaels, are not self-explanatory; however, for purposes of this motion, Michaels statements in his affidavit are sufficient to grant summary judgment as to liability.

On the other hand, 307 Canal's fourth cause of action seeking payment to cover increased real estate tax on the Premises is hereby dismissed as 307 Canal acknowledges that T-Mobile has now made the required payments. In addition, the third cause of action which asserts a negligence claim based on T-Mobile's breach of the Lease must be dismissed as redundant of the breach of contract claims.

Conclusion

In view of the above, it is

ORDERED that T-Mobile's motion for summary judgment is granted only to the extent of dismissing the third and fourth causes of action (for negligence and for payment of real estate taxes); and it is further

ORDERED that 307 Canal is entitled to summary judgment as to liability as to the first, second and fifth causes of action; and it is further

ORDERED that the issue as to the amount of damages incurred in connection with these causes of action including the amount of reasonable attorneys' fees is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@court.state.ny.us) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures); and it is further

ORDERED that counsel for 307 Canal shall, within 20 days of this decision and order submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that with respect to the issue of reasonable attorneys' fees the Special Referee shall require 307 Canal to provide copies of its specific billing and time records, together with a summary and breakdown of the categories of legal services provided, and the hours attributed to each category of services; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Dated: October 18, 2011

FILED

NOV 07 2011

J.S.C.