

Goldsmith v Ellenberg
2011 NY Slip Op 34105(U)
January 4, 2011
Supreme Court, New York County
Docket Number: 115560/2008
Judge: Eileen Bransten
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PRESENT: Bransten
Justice

PART 3m

David Goldsmen

INDEX NO. 115560/08

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Sheppard Ellenberg et al

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

Dated: 1-4-11

Eileen Bransten
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 THREE

-----X
DAVID GOLDSMITH,

Plaintiff,

-against-

Index No.: 115560/2008
Motion Date: 07/27/2010
Motion Seq. No.: 003, 004

SHEPPARD ELLENBERG, PENQUIN TENANTS
CORP., ARISTOCRAT SUPPER CLUB, LLC, and
JOHN DOE, As Subtenant of the Restaurant Premises
located at 19-21-23 West 9th Street, New York, New York,

Defendants.

----- X
PRESENT: EILEEN BRANSTEN, J:

In Motion Sequence 003, Defendants Sheppard Ellenberg (“Ellenberg”), Aristocrat Supper Club, LLC (“Aristocrat”) and the “John Doe” defendants (collectively “Defendants”) move for summary judgment pursuant to CPLR § 3212 dismissing Plaintiff’s complaint and granting a declaratory judgment on defendants Ellenberg’s and Aristocrat’s counterclaim for a declaratory judgment. Plaintiff opposes.

In Motion Sequence 004, Plaintiff David Goldsmith (“Plaintiff”) moves for summary judgment pursuant to CPLR § 3212, to amend the complaint to add causes of action pursuant to CPLR § 3025 and to deem the amended complaint served. Defendants and defendant Penguin Tenants Corp. (incorrectly captioned as “Penguin Tenants Corp.”) oppose.

Both motions are consolidated for disposition.

BACKGROUND

Plaintiff's complaint, inter alia, seeks to determine rights to the backyard of the building at 23 West 9th Street in New York City (respectively the "Backyard" and the "Building").

Ellenberg alleges that he purchased the Building from the prior owner's estate in the late 1970s. He states that the Building's sublevel had been occupied by a restaurant prior to his purchase of the Building. Ellenberg further alleges that he converted the building to a cooperative in 1980, at which time he leased the Building's sublevel for 99 years (Affirmation of Richard E. Lerner in Support of [Plaintiff's] Motion to Amend the Complaint and for Summary Judgment [the "004 Lerner Aff.,"], Ex. H [the "Master Lease"]; Affirmation of Peter B. Foster in Support of [Defendants'] Motion for Summary Judgment ["003 Foster Aff.,"], Ex. G). Ellenberg contends that the Master Lease allows him or his assignee [the "Sublevel Tenant"] the right to continue to use the sublevel as a restaurant.

Ellenberg alleges that the restaurant's use of the Backyard was a source of noise complaints from the residents of the Building. Paragraph 48 into the Master Lease aimed to alleviate these complaints and permit the restaurant occupying the sublevel to continue to use the backyard (003 Foster Aff., ¶¶ 11 (a) - (f)).

The parties concede that the instant case turns on paragraph 48 of the Master Lease.

Paragraph 48 states, in pertinent part:

Within one (1) year from the Commencement Date, the [Sublevel] Tenant shall have the right to commence renovation on the [sublevel] for the purpose of extending the [sublevel] behind [the Building], from the now existing building line thereof to the property line. In the event that such an extension is made, then the [Sublevel] Tenant agrees to build, at its sole cost and expense, a terrace behind [the Building], for the sole use and occupancy of the first floor apartment in said building. In the event that [Sublevel] Tenant does not commence such renovations within one (1) year from the commencement date, then the right of [Sublevel] Tenant to extend the [sublevel] behind [the Building] shall terminate and the corresponding area of said building will revert to the use and occupancy of the first floor tenant of [the Building].

Paragraph 48 of the Master Lease thus allowed the Sublevel Tenant the option to expand the sublevel into the Backyard within a year of the date of the Master Lease's effective date. The Master Lease is dated March 22, 1979, but, per its terms, became effective the day "immediately preceding the date that title to the Building is transferred to the Apartment Corporation" (Master Lease, ¶ 47).

Ellenberg contends that two extensions were built. The first was allegedly built by Ellenberg's assignee, Gerald Simon, during the Spring of 1979. The second extension was allegedly built by a subsequent assignee, Tommy Baratta, in 1980 (003 Foster Aff., Ex. F [the "Ellenberg Aff."], ¶¶ 13, 24).

Plaintiff is now the first floor tenant to whom paragraph 48 refers (004 Lerner Aff., ¶ 4).

Plaintiff contends that the extensions in the Backyard were constructed without building permits. Because of their alleged illegality, Plaintiff argues that the extensions

could not have exercised the extension option granted by paragraph 48. Additionally, Plaintiff contends that paragraph 48 obligates the Sublevel Tenant to build from the existing building line all the way to the property line, if at all. Plaintiff alleges, and Defendants do not deny, that the existing extensions fall short of the property line. Plaintiff contends on these bases that the extensions cannot exercise the Sublevel Tenant's extension option. In his motion for Summary Judgment, Plaintiff seeks a declaration that the backyard reverted to the use and enjoyment of the first floor tenant in accordance with paragraph 48. Plaintiff also seeks to amend the complaint to add causes of action.

In their motion for summary judgment, Ellenberg, Aristocrat and the John Doe defendants seek to have the complaint dismissed and a declaratory judgment in their favor. Defendants contend that the extension in the Backyard complies with the requirements of paragraph 48 and thus validly exercised the extension option. Therefore, Defendants contend that the Sublevel Tenant has a 99-year lease over the Backyard.

ANALYSIS

I. Summary Judgment

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon making such a showing, the burden of

proof shifts to the party opposing the motion (*id.*). In order to defeat the motion, the opposing party “must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” or an acceptable reason for his failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

II. Neither Party is Entitled to Summary Judgment

a. The Parties' Allegations

In support of his motion and in opposition to Defendants' motion, Plaintiff argues that the Sublevel Tenant never exercised the extension option. Plaintiff contends that while the extension or extensions in the Backyard were built, construction was completed without permits, and the extensions are therefore illegal. Plaintiff argues that their construction thus cannot have exercised the extension option, and that he is thereby the sole leaseholder over the Backyard. Plaintiff further alleges that paragraph 48 obligates the Sublevel Tenant to build its extension from the building line to the property line if at all.

Defendants allege that Sublevel Tenant Gerald Simon built an extension behind the Building and a terrace for the first floor tenant and, subsequently, Sublevel Tenant Tommy Baratta also built an extension behind the Building and a terrace for the first floor tenant, all within the one-year window established by the Master Lease. Defendants allege that the Sublevel Tenant thus retained a leasehold interest in the Backyard.

The parties agree that there is no longer a terrace affixed to the first floor apartment. Defendants allege that the terrace was built in 1979 but removed roughly fifteen years later. Plaintiff claims that Defendants have not submitted admissible evidence of the terrace ever being finished and that, therefore, for the purposes of the instant motions, the terrace was never built.

b. Plaintiff Has Not Shown The Extensions Were Constructed Illegally

Plaintiff alleges that no permit was ever obtained for the extensions in the Backyard and that, therefore, the extension is illegal and cannot have exercised the extension option.

Plaintiff claims that:

shareholder Judy Schuchalter noted in a letter that no building permit was ever issued for an extension in the backyard. More recently, engineering reports from 1997 also state that the existing extension is an illegal extension. Defendant Ellenberg acknowledged at his deposition that the rear extension was built without a permit and was not legalized. He gave the same testimony at arbitration (004 Lerner Aff, p. 6).

Plaintiff overstates his evidence.

In her September 30, 1982 letter, Judy Schuchalter did not note that no building permit had been issued for the extension in the backyard. Rather, she noted that no building permit was posted and asked if one had been issued (004 Lerner Aff., Ex. K).

Similarly, the 1997 engineering report states that “Based upon a preliminary search of the (DOB) Records I was not able to find approval of plans & applications for the rear

extensions built at the Cellar level for the restaurant. However, there is a possibility that there may be such records to be found in the (DOB) Archives” (004 Lerner Aff, Ex. Q). The report thus does not say, as Plaintiff contends, that the existing extensions are illegal. The report merely states that the engineer’s preliminary search did not reveal certain paperwork related to the rear extensions.

Nor did Ellenberg definitively state at either his 2009 deposition or the 2006 arbitration that the existing extensions were built without a permit. At the deposition, Ellenberg stated that “I don’t know if they were illegal. That, I can’t tell you. But I know they didn’t seem to have a permit” (004 Lerner Aff., Ex. R [November 18, 2009 Ellenberg Deposition Testimony], p. 10:11-14). Later in the deposition, Ellenberg confusingly testified “I think that [the extensions] were built legal. I think they needed a permit” (*id.*, p. 23:22-23).

Ellenberg’s statements from the 2006 arbitration are similarly vague. Therein, Ellenberg briefly alludes to “legalizing the extension on the rear yard of 23”(004 Lerner Aff., Ex. N, p. 593:12-16). Ellenberg says nothing more about the extensions’ legality.

Ellenberg’s noncommittal responses are entirely lacking in context or specificity. His statements do not amount to a declaration that the existing extension was built without a permit. Additionally, it not clear to what extension he refers – Ellenberg alleges that two extensions were built: the first in 1979, the second in 1980 (*see* Ellenberg Aff., ¶¶ 13, 24).

If the alleged first extension satisfied the requirements of paragraph 48, it would not matter for the court's purposes on the instant motion whether or not the second extension was legal.

Plaintiff has not shown that the extension, or, rather, the first extension, was illegal at the time of construction. An issue of fact therefore exists which prevents summary judgment (*see Alvarez*, 68 NY2d at 324).

c. Paragraph 48 (i) is Ambiguous

A contract term is ambiguous if it is "reasonably susceptible of more than one interpretation" (*Foot Locker, Inc. v Omni Funding Corp. of America*, 911 NYS2d 344, 345 [1st Dept 2010] [quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]]). Where a contract term is ambiguous, "extrinsic evidence is admissible to determine the parties' intent" (*Federal Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 43 [1st Dept 1999]). The need for extrinsic evidence will often preclude summary judgment unless the veracity of such evidence is undisputed (*see Amusement Bus. Underwriters v American Intl. Group*, 66 NY2d 878, 880 [1985] [finding that "[W]hile the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence, then the issue is one of fact"]; *see also Foot Locker, Inc.*, 911 NYS2d at 345-46; *Bana Elec. Corp. v Bethpage Union Free School Dist.*, 76 AD3d 987 [2d Dept 2010]; *Shadlich v Rongrant Associates, LLC*, 66 AD3d 759, 760 [2d Dept 2009]).

Plaintiff contends that the language “the [Sublevel] Tenant shall have the right to commence renovation on the [sublevel] for the purpose of extending the [sublevel] behind [the Building], from the now existing building line thereof to the property line” obligated the Sublevel Tenant to build all the way to the property line, if at all ([Plaintiff’s] Memorandum of Law in Support of Motion to Amend Complaint and for Summary Judgment [“Plaintiff’s 004 Memo”], pp. 3-4). Plaintiff further argues that:

the Scheme contemplated by the [cooperative offering plan] and the restaurant’s lease is simple. The restaurant gets to take the backyard and, in exchange, the [first floor unit owner] gets a terrace. In this quid pro quo, everybody wins. The scheme only works, however, if the restaurant fulfills its end of the bargain. That is, it has to extend its space completely into the garden, all the way “to the property line” (id., p. 3).

Plaintiff’s reading of paragraph 48 is reasonable, although Plaintiff’s quid pro quo argument is problematic. Plaintiff’s argument presumes that the first floor unit has the Backyard to give in exchange for a terrace. However, neither parties’ exhibits establish that Plaintiff’s presumption is correct. Ellenberg alleges that, prior to his purchase of the Building, execution of the Master Lease, and conversion of the Building to a cooperative, the Backyard had been utilized by the Sublevel Tenant, not the first floor tenant (Ellenberg Aff., ¶¶ 4, 9). In a similar vein, Defendants contend that defendant Penguin Tenants Corp., the corporation that owns the building, never had a possessory interest in the Backyard, and thus it could not transfer a possessory interest in the Backyard to Goldsmith by his purchase of

shares in the cooperative (Affirmation of Peter B. Foster in Opposition to Plaintiff's Motion for Summary Judgment, ¶ 8).

Although a quid pro quo is plausible, Plaintiff has not proven it. Even if Plaintiff had done so, the existence of a quid pro quo would not compel the court to conclude that paragraph 48 requires the Sublevel Tenant to build both the terrace and extension to the property line.

Additionally, Ellenberg contends that the extension option conveyed by paragraph 48 of the Master Lease was granted with the goal of controlling restaurant noise that had allegedly previously been a source of complaints from the tenants of the Building, not as a means of securing a terrace in exchange for the Sublevel Tenant's use of the Backyard. (Ellenberg Aff., ¶¶ 9-11). It follows that, with noise control in mind, it would not matter whether the extension reached all the way to the property line – enclosure of the backyard space to be utilized would be the critical point. However, such an argument is a factual issue upon which summary judgment may not be granted.

Defendants, in turn, contend that the language of paragraph 48 speaks in terms of rights and not obligations. Defendants argue that the language "the [Sublevel] Tenant shall have the right to commence renovation on the [sublevel] for the purpose of extending the [sublevel] behind [the Building], from the now existing building line thereof to the property line" gives the Sublevel Tenant the right to construct an extension of the sublevel from the

building line as far as the property line. Defendants contend that the extension need not extend to the property line in order to exercise the extension option (003 Foster Aff., ¶¶ 27-29). Defendants' argument is also reasonable.

In short, paragraph 48 is reasonably susceptible to more than one interpretation. It is clear that the Sublevel Tenant was obligated to build a terrace for the first floor tenant in the event that the Sublevel Tenant utilized its extension rights under paragraph 48. It is unclear exactly what those rights are – paragraph 48 could be read to define a limit, as Defendants contend, or an obligation, as Plaintiff contends. Indeed, the parties' motions accentuate the fact that paragraph 48 is ambiguous and that the court will need to consider extrinsic evidence to determine the parties' intent.

Neither party has demonstrated entitlement to judgment as a matter of law, and Plaintiff's and Defendants' motions for summary judgment are therefore denied.

III. Amending the Complaint

Plaintiff moves for leave to amend its complaint to add causes of action.

In opposition, Defendants argue that Plaintiff's delay in bringing the claim will prejudice them because no discovery has been conducted with regards to Plaintiff's new allegations.

CPLR 3025 (b) liberally permits parties to amend pleadings by leave of the court, stating that “A party may amend his pleading . . . at any time by leave of the court or by stipulation of all parties” (CPLR 3025).

While the standard to grant leave to amend is liberal, a motion for leave to amend may be denied. However, “[m]ere lateness is not a barrier to amendment. It must be lateness coupled with significant prejudice to the other side” (Siegel, Practice Commentaries, McKinney’s Cons. Laws of New York, CPLR 3025:5, p. 356). Prejudice “is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 [1981]).

Defendants’ argument regarding discovery on Plaintiff’s new claims is insufficient to deny Plaintiff’s motion for leave to amend the complaint, even at this advanced stage in the litigation. CPLR 3025 allows the motion to be made “at any time” and directs that “leave shall be freely given” (CPLR 3025 [b]). New York’s policy regarding amendment of pleadings is liberal, and Defendants’ claim of prejudice can be mitigated by directing additional discovery.

Accordingly, it is

ORDERED that Defendants' Motion for Summary Judgment (motion seq. no 003) is DENIED, and it is further

ORDERED that Plaintiff's Motion for Summary Judgment (motion seq. no 004) is DENIED, and it is further

ORDERED that Plaintiff's Motion for Leave to Amend the Complaint (motion seq. no 004) is GRANTED; and it is further

ORDERED that the note of issue is vacated pending conclusion of discovery on Plaintiff's additional causes of action, to be concluded no later than March 1, 2011, and it is further

ORDERED that a new Note of Issue is to be filed March 4, 2011; and it is further

ORDERED that the parties are directed to appear for a status conference before the court on January 25, 2011.

This constitutes the decision and order of the court.

Dated: New York, New York

January 4, 2011

ENTER



Hon. Eileen Bransten, J.S.C.

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

PRESENT: Bransten
Justice

PART 3m

David Goldsmen

INDEX NO. 115560/08

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Sheppard Ellenberg et al

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1-4-11

Eileen Bransten
EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

DAVID GOLDSMITH

Plaintiff,

- v -

INDEX NO. 115560/2008
MOTION DATE: 12/14/2009
MOTION SEQ. NO. : 003
MOTION CAL. NO.

SHEPPARD ELLENBERG, PENQUIN TENANTS CORP.,
ARISTOCRAT SUPPER CLUB, LLC, and JOHN DOE,
as subtenant of the Restaurant Premises located at
19-21-23 West 9th Street, New York, New York

Defendant.

The following papers, numbered 1 to 3 were read on this motion for summary judgment

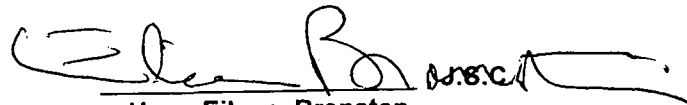
	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH A COMPANYING MEMORANDUM DECISION

Dated: 1-4-11


Hon. Eileen Bransten

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

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