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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 103136/2011
TOWN TENNIS MEMBER CLUB
vs.
PLAZA 400 OWNERS CORP.
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

9/20/12

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

AUG 17 2012

Dated: _____

_____, J.S.C.
HON. JUDITH J. GISCHE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Supreme court of the State of New York
County of New York: IAS10

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Town Tennis Member Club, Inc.

Plaintiff,

-against-

Plaza 400 Owners Corp.,

Defendant.

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Plaza 400 Owners Corp.,

Third-Party Plaintiff,

-against-

Arrow Restoration, Inc.

Third-Party Defendant.

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Decision/Order

Index # 103136/11
Motion Seq.: #002

Hon. Judith J. Gische:

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court on this motion:

PAPERS	NUMBERED
Notice of Motion, DSA affirm., NW affd.,	1
Exhibits to motion	2
Notice of Cross-motion, EJB affd., exhibits	3
DSA affirm. in opp., exhibits	4

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant/Third-Party Plaintiff, Plaza 400 Owners Corp., ("Plaza 400") moves pursuant to CPLR §3211 to dismiss the complaint. Plaintiff, Town Tennis Member Club, Inc. ("Town Tennis") opposes the motion and cross-moves for partial summary judgment on its First, Second, Fourth and Fifth causes of action. Issue has been joined and no note of issue has yet been filed. The cross-motion is, therefore timely, and otherwise appropriately before the court. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004).

Town Tennis operates a tennis club ("tennis club' or "garage rooftop") on the roof of an existing one story garage, located at 417-435 East 55th Street, New York, N.Y. ("garage" or "417-435 East 55th Street"). It leases the tennis club from Plaza 400, pursuant to a written lease agreement ("lease"). The complaint alleges that beginning in April 2006, Plaza 400 commenced renovation work on the facade of a building adjacent to the garage ("adjacent building"). The adjacent building is located at 400 East 56th Street, New York, N.Y. (Sometimes "adjacent building" or "400 East 56th Street") and is owned by Plaza 400. Town Tennis alleges that during the course of the renovation work, the garage rooftop leased to it was used for construction materials, tools and workers. It claims that the facade work to the adjacent building created construction debris that fell on the garage rooftop. Town Tennis further claims that Plaza 400's actions were taken without its permission. Town Tennis alleges that as a result of the construction work to the facade of the adjacent building, the tennis club facilities were rendered partially inoperable and required repairs. Town Tennis asserts the following causes of action, for which it is seeking monetary damages in excess of $400,000: breach of lease (first cause of action); breach of covenant of good faith and fair dealing (second cause of action); breach of covenant of quiet enjoyment (third cause of action); private nuisance (fourth cause of action); trespass (fifth cause of action); and attorneys fees (sixth cause of action).[1]

Summary of the Arguments

Plaza 400 claims that this action should be dismissed because indisputable

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[1]There is no claim asserted for negligence, which would have otherwise been barred by the applicable three year statute of limitations at the time this action was brought. CPLR 214(5).

documentary evidence, consisting of the lease, precludes all of the causes of action alleged by Town Tennis. It argues that the lease provides Plaza 400 with an unfettered right to enter the demised premises to make repairs, which, as a matter of law, forecloses liability for the claims made in this action.

Town Tennis argues that Plaza 400's rights under the lease to enter the demised premises to make repairs was limited to the garage only and not the adjacent building. It acknowledges that there is a limited exception if excavation or shoring work is necessary, but that such exceptions are separately stated in the lease. Town Tennis claims, therefore, that the lease provisions relied upon by Plaza 400 in support of its motion are simply inapplicable.

In support of its cross-motion for partial summary judgment, Town Tennis relies upon the affidavit of its vice president, Edward J. Banquero, which sets out facts relating to Plaza 400's use of the demised premises to do work at the adjacent building and falling debris as a result of such work. In opposition to the cross-motion, Plaza 400 relies upon the lease provisions that it claims permit such a use of the demised premises and otherwise effect a waiver of liability.

Discussion

[1] Motion to Dismiss

Plaza 400's motion, based solely upon the lease, seeks dismissal of the complaint on the basis of documentary evidence. CPLR §3211(a)(1). A lease may serve as the predicate for a motion to dismiss based on documentary evidence. 30th Place Holdings LLC .v 474431 Associates, 54 AD3d 753 (2nd dept. 2008).; Fillman v. Axel, 63 AD2d 876 (1st dept. 1978).

In order to prevail on a CPLR §3211(a)(1) motion, however, the document relied on, here the lease, must definitively dispose of plaintiff's claim. Blonder & Co., Inc. v. Citibank, N.A., 28 A.D.3d 180 (1st Dept 2006). While on a motion to dismiss the pleader is ordinarily entitled to the benefit of every favorable inference, factual allegations that are "flatly contradicted" by the lease will not be presumed true nor will they be accorded any favorable treatment. Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999) aff'd 94 NY2D 659 (2000). In all other respects, the complaint will be liberally construed, the allegations therein taken as true, and all reasonable inferences will be resolved in plaintiff's favor. Gorelik v. Mount Sinai Hosp. Center, 19 A.D.3d 319 (1st Dept 2005).

The court's interpretation of the lease should be according to the well recognized rules of contract interpretation. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990) and where the language of a contract is unambiguous, the parties' intent is determined within the four corners of the contract. In re Matco-Norca, Inc., 22 A.D.3d 495, 496 (2d Dept. 2005). "[C]ontracts[ ] are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense." Johnson v. Travelers Insurance Co., 269 NY 401 (1936) It is undisputed that Plaza 400's attorneys drafted the lease (see: Reply Memorandum of Law p.6). Thus, ambiguities, if any, are to be strictly construed against Plaza 400, as the drafter. Barrow v. Bloomfield, 30 AD2d 947 (1st dept. 1968).

Plaza 400 argues that paragraphs 4, 8. 13 and 20 of the lease establish its right to enter the demised premises for the purpose of making repairs and/or renovations. It also argues that under these same lease provisions Town Tennis has waived any right to recover for damages that may have been caused by these activities. Plaza 400 further relies on the insurance procurement provisions of the lease (paragraphs 8 and 56) to argue that Town Tennis, not Park Plaza, agreed to bear the risk of the losses for which Town Tennis now seeks compensation. Finally, Plaza 400 relies on paragraph 66 of the lease which precludes liability on account of changes in condition to the demised premises (here the rooftop) caused by compliance with any governmental laws. For the reasons more full explained below, the court holds that none of these lease provisions warrants that the instant litigation be dismissed.

Paragraphs 4, 8, 13 and 20 confer rights upon Plaza 400 and effect a waiver of liability by Town Tennis only with respect to making repairs and/or renovations to the "building." The gravamen of parties' dispute with respect to these lease provisions is what is meant by the term "building." Town Tennis contends that under the lease the building is confined to the garage located at 417-435 East 55th Street, while Plaza 400 contends that the building includes both the garage and the adjacent luxury high rise residential building located at 400 East 56th Street. The court holds that Town Tennis' interpretation of the term "building" is consistent with the language of the lease. In this regard, the extrinsic evidence, outside of the lease, that Town Tennis offers to prove that the two addresses are generally treated by Plaza 400 as two separate buildings is not necessary or relevant to the court's inquiry.

Most clearly, the "Witnesseth" paragraph contained on page one of the lease

expressly defines 417-435 East 55th Street as the "Building." Exhibit A to the lease, which is a schematic of the garage and surrounding structures, identifies 400 East 56th Street as an "Adjacent Building." The lease itself distinctively refers to Adjacent Buildings, in distinction to the building, in defining specific rights and obligations between the parties (Lease paragraphs 41(B) and 44; see also paragraph 34).

Plaza 400 reliance on lease paragraph 41, which describes the "building" as a "luxury residential building," does not command a different result. To the extent that paragraph 41 offers a different understanding of the word "Building" than is otherwise contained throughout the lease, it should be limited to that paragraph only. Lease paragraph 41 is not a general definition paragraph, unlike the Witnesseth provision which actually defines the word "building." It is limited to describing how Town Tennis may use the demised premises in view of the surrounding structures. This isolated description of a luxury residential building, for a limited purpose, in a document otherwise drafted by Plaza 400's attorneys, is not a basis for disregarding a plain reading of the definition of "building" that is otherwise contained in the lease.

Nor does the lease contain a waiver of liability precluding this action. Lease paragraph 8, in part, requires that Town Tennis maintain general liability insurance against claims for bodily injury or death or property damage occurring in or upon the demised premises. Lease paragraph 56A reiterates this requirement and particularizes the monetary threshold for the policy. It also adds economic loss as a covered risk. Lease paragraph 56E(2) contains a release by Town Tennis of Plaza 400 for any loss, damage or destruction to property, including rental value or business interest, but only to the extent that town Tennis is insured under a policy containing a waiver of subrogation

clause.

Even if the court were to broadly read these insurance procurement provisions in the lease to limit liability, they are not enforceable against allegations of intentional conduct. While a contractual provision that limits damages may generally be enforced, it is unenforceable if it otherwise violates public policy. It is the strong public policy of this state that a party may not insulate itself from liability for conduct that is intentional or grossly negligent. Abacus Federal Savings Bank v. ADT Security, 18 NY3d 675 (2012); Berenger v. 261 West LLC, 93 AD3d 175 (1st dept. 2012); Duane Reade v. 405 Lexington LLC, 22 AD3d 108 (1st dept. 2005). In this case, the causes of action for trespass and private nuisance are intentional torts which, as a matter of public policy, cannot be affected by any waiver of rights. The recent case of Berenger v. 261 West LLC, *supra*, is directly on point, where the Appellate Division of ths department held that a waiver of damages provision in a condominium offering plan violated public policy and, consequently, did not preclude the claims of trespass and nuisance being asserted against the sponsor.

In any event, the insurance procurement provisions and the limited waiver of liability contained therein do not bar the instant action, including the four remaining causes of action emanate from the landlord tenant relationship. The obligation to obtain insurance under a contract is not the same as a waiver of liability. Great Northern Insurance company v. Interior Construction Corp., 7 NY3d 412 (2006). Thus, to the extent the lease provisions require Town Tennis to obtain liability insurance, this provision cannot, on its own, trigger any waiver of liability. In this regard, the parties dispute about whether Town Tennis obtained sufficient insurance under the lease,

and/or whether its insurance company properly rejected the claim is not pertinent to the issue of waiver.[2]

There is express waiver language in Lease paragraph 56E (2), but it is limited. The waiver includes claims for damages made against Plaza 400, including damages for "rental value" and "business interest." It is limited, however, only to the extent to which Town Tennis is insured under a policy of insurance that includes a waiver of subrogation provision. The insurance policy or policies at issue are not even before the court, so it is unknown whether they include a subrogation clause, which is the first requirement for an effective waiver. In any event, lease paragraph 56E (1) does not mandate that Town Tennis obtain insurance with a waiver of subrogation clause, only that it use its best efforts. Thus, reading the insurance procurement provisions together with the "waiver" leads to a conclusion that the waiver is only effective if Town Tennis can recover on its claim for damages against its own insurance company. In addition, even were the policy to have a waiver of subrogation clause, the courts have interpreted waiver of provisions as having no application outside the scope of the landlord tenant relationship. Atlantic Mutual Insurance Company v. Eliana Properties, 261 AD2d 296 (1st dept. 1999); Interested Underwriters at Lloyds v. Ducors, Inc., 103 AD2d 76 (1st dept. 1984). At bar, the activities giving rise to the claims of liability arise not from Plaza 400's relationship as landlord to Town Tennis, but as a consequence of its ownership of the adjacent building located at 400 East 56th Street. Thus, the limited waiver in the insurance procurement provision of the lease is not sufficient to defeat any of the claims made in this action.

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[2]There is no counterclaim for failure to procure insurance, so that the court never even reaches these disputes in the context of this litigation.

Plaza 400 also relies on paragraph 66 of the lease which state that the "Owner shall not be responsible for any change of condition in the Demised Premises caused by compliance with any present or future laws, rules, orders, ordinances, requirements or regulations of and Federal, State, County or Municipal Authority." Plaza 400 argues that because the exterior work done at 400 East 56th Street was pursuant to Local law 11, paragraph 66 applies. Here Local Law 11 did not designate that the work to 400 East 56th Street be done (and could only be done) by staging the required construction materials in the demised premises. Thus, compliance with Local Law 11 did not cause any change in the condition of the demised premises.

Accordingly, the court holds that Plaza 400's motion to dismiss the complaint is denied.

[2] Cross-Motion for Summary Judgment

Town Tennis has cross-moved for summary judgment only on the issue of liability and limited to its causes of action for breach of lease, private nuisance and trespass. On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The party opposing the motion must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986).

In support of it's cross-motion Town Tennis has provided the affidavit of Edward J. Baquero, its vice president. Baquero states that for an approximate three year period, beginning in 2006 and ending sometime in 2008, Plaza 400 did Local Law 11 work at

400 East 56ht Street on the wall that is adjacent to the demised premises. He claims that in connection with the work done, Plaza 400 placed tarps and plywood on tennis court 3, which was part of the demised premises. Baquero also claims that other work materials for the Local Law 11 work were placed at the demised premises and that the workers used the area to stage the work on the adjacent building. Baquero has included photographs that confirm all of these claims. Additionally Baquero also claims that debris emanating from the work done on the facade at 400 east 56th Street, fell and was deposited on th the rooftop tennis center. He claims that all of these actions substantially interfered with Town Tennis' ability to operate the premises as a tennis club.

The cross-motion is opposed only by the submission of an attorneys affirmation. There is no affidavit or other sworn statement from a person with knowledge disputing the facts as claimed by Town Tennis. The opposition consists solely of the same document (the lease) and legal arguments made, which have already been rejected by the court, in connection with Plaza 400's motion to dismiss. Thus, the court's inquiry is limited to whether Town Tennis makes out its *prima facie* case.

[A] Partial Constructive Eviction-breach of lease

In the first and second causes of action, Town Tennis respectively assets breach of lease and breach of the covenant of quiet enjoyment. Both causes of action, however, are predicated on its claim that Plaza 400's actions constituted a partial constructive eviction. To the extent that each of these causes of action are predicated on the same events and legal theory, they are duplicative, with only one right of recovery. Phoenix

Garden Rest. Inc. v. Chu, 245 AD2d 164 (1st dept. 1997). [3]

In the seminal case of Barash v. Pennsylvania Terminal Real Estate Corp., 26 NY 77 (1970), the Court of Appeals recognized that in the context of a commercial lease, a landlord is not entitled to recover the full amount of the rent if the tenant has been actually or constructively evicted from either the whole or part of the leasehold. An actual eviction takes place when the acts of the landlord cause a physical expulsion or exclusion from the premises. A constructive eviction occurs when there is an abandonment of the premises by the tenant because the continued beneficial use of the premises is impossible. Barash v. Pennsylvania Terminal Real Estate Corp., *supra*; Manhattan Mansions v. Moe's Pizza, 149 Misc.2d 43 (NY Civ Ct. 1990). A constructive eviction that is only partial, may nonetheless, still warrant a remedy, albeit something less than a full rent abatement Minjak Co. v. Diane Randolph, 140 AD2d 245 (1st dept. 1988); New York City Economic Development Group v. Harborside, 12 Misc3d 1160 (NY Civ Ct. 2006).

It is undisputed that Plaza 400 entered the demised premises for the purpose of doing local law compliance work at an adjacent building. The court has already held that Plaza 400 had no right under the lease to enter the demised premises to do repairs to another building. The entry by Plaza 400 for such purpose was, therefore wrongful. It is also undisputed that as a consequence of such entry, Town Tennis had to abandon using a portion of its premises essential to its operation as a tennis club. It was unable

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[3]It would also appear that these causes of action also duplicate the third cause of action for breach of the covenant of good faith and fair dealing. Phoenix Garden Rest. Inc. v. Chu, *supra*. Since the tihrd cause of action is not implicated int his motion, however, the court does not address this point.

to use tennis court 3.

The court finds that the undisputed facts establish that Plaza 400 partially constructively evicted Town Tennis from a portion of the demised premises, warranting a trial on damages.

[B] Trespass

Trespass is an intentional tort. It is the intentional entry onto the land of another without justification or permission. Phillips v. Sun Oil Co., 307 NY 328 (1954); Long Island Gynecological Services, PC v. Murphy, 298 AD2d 504 (2nd dept. 2002). Facts that establish a partial constructive eviction likewise establish a *prima facie* case of liability for trespass. Only the measure of recoverable damages may be different. PWB Enterprises, Inc. v. Mokiam Enterprises, Inc., 221 AD2d 184 (1st dept. 1995).

Thus, Town Tennis is entitled to summary judgment on the issue of liability on its cause of action for trespass.

[C] Private Nuisance

Elements of a claim for private nuisance are: [1] an interference substantial in nature, [2] intentional in origin; [3] unreasonable in character, [4] with a right to use and enjoy property [5] caused by the actions of (or failure to act by) another. Berenger v. 261 West LLC, *supra*. Itis characterized by a pattern of continuity or recurrance of the objectionable conduct. Domen Holding Co. v. Aranovich, 1 N.Y.3d 117, 124 (2003).

At bar, it is undisputed that Plaza 400 interfered with Town Tennis' rights under the lease to use and enjoy the demised premises. These actions deprived Town Tennis of the ability to use one of its tennis courts. It is evident that interference with the use of a tennis court in a tennis club is a substantial interference and the interference persisted

for almost 3 years. The facts also establish that the interference was an intentional use of the demised premises by Plaza 400 to benefit another property that it owned. These facts, which are undisputed in the record, entitle plaintiff to summary judgment on the issue of liability on its cause of action for private nuisance.

Conclusion

In accordance herewith it is hereby:

ORDERED that defendants' motion to dismiss the complaint is denied in its entirety and it is further

ORDERED that plaintiff's motion for partial summary judgment is on the first, second, fourth and fifth causes of action is granted on the issue of liability only and it is further

ORDERED that the once discovery has been completed, the trial shall proceed only on the third and sixth causes of action on the issues of both liability and damages and on the issue of damages only on the first, second, fourth and fifth causes of action. and it is further

ORDERED that the matter is set for a court **conference on September 20, 2012 at 9:30 am**, no further notices will be sent, and it is further

ORDERED that any requested relief not expressly granted herein is denied and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 17, 2012

SO ORDERED:

J.G. J.S.C.