Five Corners Car Wash, Inc. v Minrod Realty Corp.
2013 NY Slip Op 34084(U)
March 19, 2013
Supreme Court, Nassau County
Docket Number: 11130/12
Judge: Denise L. Sher

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

FIVE CORNERS CAR WASH, INC.,

Plaintiff,

- against -

MINROD REALTY CORPORATION,

Defendant.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 11130/12
Motion Seq. Nos.: 01, 02
Motion Dates: 01/14/13
01/28/13

The following papers have been read on these motions:

	Papers Numbered
Order to Show Cause (Seq. No. 01), Affidavit and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affidavit, Affirmation and Exhibits and Memorandum of Law	2
Affidavit in Opposition to Cross-Motion and Further Support of Order to Show Cause and Exhibits and Memorandum of Law	3
Affirmation in Response to Affidavit in Opposition to Cross-Motion	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 01) for an order authorizing it to withhold paying future rent and any other leasehold charges or additional rent to defendant and directing that plaintiff may apply said rents/charges or additional rent to the repairs/alterations/replacement of the common roof at the premises known as 2080 Hillside Avenue, New Hyde Park, New York until such time as the cost of the aforesaid common roof repairs is paid in full.

Defendant opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR §

3211(a)(7), for an order dismissing the Complaint with prejudice and granting attorney fees. Plaintiff opposes the cross-motion.

By way of background, plaintiff is a domestic corporation with its principal place of business located at 2080 Hillside Avenue, New Hyde Park, New York. On or about January 1, 1996, plaintiff entered into a written lease agreement with defendant for the premises known as 2076-2078-2080 Hillside Avenue, New Hyde Park, New York (the "subject premises") for a term of thirty-five (35) years. *See* Plaintiff's Affidavit in Support Exhibit A. Since April 1984, plaintiff has been a tenant at the subject premises, conducting its business as an automobile car wash and detailing shop and auto accessory showroom, remitting to defendant, as landlord, the agreed upon monthly rent and periodic additional rent.

Plaintiff commenced the instant action with the filing of a Summons and Complaint on or about August 31, 2012. *See* Plaintiff's Affidavit in Support Exhibit B. Issue was joined on or about October 23, 2012. *See* Defendant's Affirmation in Support Exhibit D. In the action, plaintiff is seeking a declaratory judgment setting forth the rights and obligations of the parties under the written Lease Agreement at issue and applicable law as it pertains to necessary structural repairs to the common roof at the subject premises.

Plaintiff contends that "the common roof of the subject premises is severely deficient at this time in that there are layers of the roof failing, that flashing in the same is failing and deficient in the major areas, that there are gaps and separations found in several locations, and that the underlayment or tar paper is in poor condition among other objectionable things (hereinafter "common roof deficiencies"). Plaintiff asserts that the common roof deficiencies have and continue to cause collateral damage to other parts of the subject premises, including,

but not limited to, the space occupied by plaintiff in conducting its business. Plaintiff claims that the common roof deficiencies have been brought to the defendant's attention on numerous occasions and defendant has failed and/or refused to replace said failing common roof or cause the same to be replaced. Plaintiff argues that the obligation of defendant to replace the common roof at the subject premises is set forth in the express provision of the Lease Agreement. The roof at the subject premises exists for the common benefit of all of the tenants and in the absence of an agreement to the contrary, the landlord is obligated to keep the same in repair and good condition for the tenants.

Plaintiff contends that the express language of the Lease Agreement provides for and contemplates the defendant, as landlord, making structural repairs. Plaintiff submits that the 6th Paragraph of the subject Lease Agreement states,

> "[t]he said Tenant agrees that the said Landlord and the Landlord's agents and other representatives shall have the right to enter into and upon said premises, or any part thereof, at all reasonable hours for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof." *See* Plaintiff's Affidavit in Support Exhibit A ¶ 6.

Plaintiff further submits that the 35th Paragraph of the subject Lease Agreement states,

> "[t]he Landlord agrees that the Tenant may share in common with others the presently established parking area in the rear of the building, but that the cleaning of same shall be the mutual obligation of all the tenants. The Landlord further agrees that the Tenant shall have the right of ingress and egress, in common with others, over that area of the plot on which the premises are erected running westerly from Denton Avenue." *See id.* at ¶ 35.

Plaintiff argues that "[t]he express language of the foregoing provisions of the Lease Agreement provide for and contemplate that the defendant/landlord will make structural

repairs/alterations such as repairs/alterations to the common roof since the landlord has the right to inspect the premises for the purpose of making repairs or alterations (paragraph 6th) and the roof is common to the two tenants (see paragraph 35th)." Plaintiff adds that "[s]ome fifteen (15) years ago, the common roof required replacement which the defendant/landlord undertook to do without incident and arranged for the replacement of the same. However, at this time, Defendant has failed to comply with the Lease Agreements and to make the common roof repair/alteration as requested by plaintiff/tenant on numerous occasions."

As previously indicated, defendant opposes the motion and cross-moves (Seq. No. 02) for an order dismissing plaintiff's Complaint. With respect to the subject premises, Robert McMahon, property manager for defendant, asserts that "[a] flat rubberized roof covers the building. Attached to the roof are various items of equipment which are utilized by the plaintiff in connection with the conduct of its business. Prior to the commencement of this action, Mr. Rubinstein called me complaining of roof leeks. As a courtesy, I told him that I would send someone to look at the roof and make minor repairs, if necessary. He refused this offer, demanding that a new roof be installed. I explained to Mr. Rubinstein that plaintiff had a long term lease, utilized substantially the entire premises for its car wash business and was required by the lease to make 'all repairs' to the premises. Unfortunately, the plaintiff has chosen to ignore the plain terms of the lease and instead has commenced this unnecessary and frivolous litigation."

Counsel for defendant argues, "[p]aragraph 2 of the Lease specifically addresses the plaintiff's duties and obligations and states that 'the Tenant shall take good care of the premises and shall, at the Tenant's own cost and expense make all repairs.' The plaintiff ignores the unambiguous language of Paragraph 2 and significantly fails to even mention Paragraph 2 in either its complaint or in its motion. Instead, the plaintiff relies on non-applicable clauses of the Lease which plaintiff claims 'contemplate' that the defendant makes the repairs. The plaintiff completely misinterprets and misconstrues the Lease so as to deem as favorable to its position

clauses which are non-applicable and/or unfavorable. For instance, the plaintiff argues that Paragraph 6 of the Lease supports its claim that the landlord is responsible for repairs to the roof. However, Paragraph 6 gives the landlord, which has given possession of the premises to the tenant, the right to enter the premises for the purpose of examining same and making repairs or alterations that may be necessary for the safety and preservation of the premises. Paragraph 6 does not obligate the landlord to make repairs....Plaintiff alleges that Paragraph 28 of the Lease - the real estate tax apportionment provision - indicates that the Lease 'contemplates' that the landlord will make repairs. The plaintiff's claim that a tax apportionment clause in a lease is indicative of a landlord's obligation to make repairs is absurd. The plaintiff also alleges that the roof is a 'common roof' in Paragraph 20 of its Complaint and in Paragraph 21 of the Affidavit of Marc Rubenstein....In support of this allegation, the plaintiff cites Paragraph 35 of the Lease. The Lease Agreement identifies one area in the rear of the premises as a common area. Paragraph 35 states in part '...that the cleaning of same [parking area] shall be the mutual obligation of all the tenants.' If the parties intended the roof to be a common area, as the plaintiff claims, the parties would have included it in the Lease. The very fact that the Lease deems only the parking area as a common area precludes the plaintiff from claiming other areas of the premises are common areas. The plaintiff also alleges in Paragraph 23 of his Affidavit that the defendant arranged for replacement of the roof fifteen years ago near the beginning of a thirty-five year term of the Lease. The plaintiff, once again, turns a blind eye to a controlling paragraph of the Lease. Paragraph 20 of the Lease states that the 'failure of the landlord to insist upon strict performance of any term of the lease...shall not be deemed a waiver of any rights or remedies...and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions and covenants herein contained.' Assuming the defendant repaired the roof near the start of the thirty five (*sic*) year lease term, Paragraph 20 clearly states that the defendant did not waive its rights to hold the plaintiff to its duty to repair. Finally, the plaintiff sets forth no facts or law to support the drastic relief it requests. The plaintiff seeks to withhold the payment of rent from the landlord and to use

the same to perform repairs which the plaintiff is obligated to make under the terms of the Lease. In addition to and in keeping with its habit of ignoring apposite lease provisions, plaintiff ignores Paragraph 26 of the Lease which would deny the plaintiff the relief it seeks in its motion."

In opposition to defendant's cross-motion, Marc Rubinstein, an officer of plaintiff, states, "[s]everal assertions in the affidavit of Defendant's current property manager, Robert McMahon, are inaccurate and I am compelled to point those matters out to the Court. First of all, I never called Mr. McMahon to request that the Defendant 'repair' the common roof, but rather, I called to notify Defendant that the common roof was beyond repair and that it needed replacement. Mr. McMahon asked that I allow his maintenance people to come to the subject premises to see whether they would be able to 'fix' the common roof (ostensibly to avoid having to replace it). I allowed the visit since I felt I had to give them the opportunity to examine or attempt to make repairs since Plaintiff was looking for and expecting that a new roof would be installed. I never refused letting the Defendant or its agent make repairs - Mr. McMahon's claim is completely inaccurate. After a number of attempts to repair the common roof, each such attempt failing to resolve the issues, I again stated to Mr. McMahon that the common roof needed to be replaced. I never said Defendant was responsible to 'repair' the common roof, as I had a roofer come to the premises on a number of occasions, and each time it was confirmed that the common roof must be replaced. Furthermore, I understand and acknowledge that repairs are my responsibility. However, replacement is the Defendant's obligation since it is replacement of a common roof, structural, and beyond a repair obligation....Defendant repeatedly refers to 'repairs' which I do not dispute is (*sic*) my responsibility. The lease provides that I must repair and maintain the common roof - but the common roof is beyond repair. A common roof is without question structural and as such its replacement becomes Defendant's responsibility....Significantly, I note that I only occupy 78% of the subject building. The other tenant occupies approximately one-quarter of the building. In no way can it be said that Car Wash is the sole or exclusive occupant of the subject premises. As such, the roof is indeed a common roof, and is landlord's legal

responsibility to replace."

In reply to plaintiff's opposition to the cross-motion, counsel for defendant submits, "[t]he plaintiff's claim that it is entitled to a judgment authorizing the indefinite withholding of rent from Minrod and to apply this rent money to pay for the repair of the roof at the premises is contrary to law. The plaintiff's duty to pay rent is not suspended even if the landlord breaches its obligations under the lease unless there is an express provision in the lease which state (*sic*) the circumstances under which the tenant may withhold the payment of rent. [citation omitted]. There is no such provision in the Lease between the parties. A tenant is obligated to pay rent as long as it occupies the premises even if the landlord failed to provide essential services. [citation omitted]. Minrod has not breached its lease and is not withholding any services whatsoever to the plaintiff. The plaintiff continues to occupy the premises and conducts business at the premises. The plaintiff is not entitled (*sic*) a blank check from Minrod."

With respect to defendant's cross-motion (Seq. No. 02), pursuant to CPLR § 3211(a)(7), for an order dismissing the Complaint with prejudice and granting attorney fees, in determining a motion to dismiss pursuant to CPLR § 3211(a)(7) for plaintiff's alleged failure to state a cause of action, the Court will afford the Complaint a liberal construction, accept the facts contained therein as true, accord plaintiff every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). While allegations of a Complaint are to be accepted as true when considering a motion to dismiss, allegations consisting of bare legal conclusions are not presumed to be true. *See Baron v. Galasso*, 83 A.D.3d 626, 921 N.Y.S.2d 100 (2d Dept. 2011); *Doria v. Masucci*, 230 A.D.2d 764, 646 N.Y.S.2d 363 (2d Dept. 1996); *Mayer v. Sanders*, 264 A.D.2d 827, 695 N.Y.S.2d 593 (2d Dept. 1999). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v.*

Martinez, *supra* at 88.

When viewing plaintiff's Complaint in light of the criteria set forth above, the Court finds that plaintiff has indeed stated a cause of action that falls within a cognizable legal theory.

Accordingly, defendant's motion, pursuant to CPLR § 3211(a)(7), for an order dismissing the Complaint with prejudice and granting attorney fees is hereby **DENIED**.

With respect to plaintiff's motion (Seq. No. 01) for an order authorizing it to withhold paying future rent and any other leasehold charges or additional rent to defendant and directing that plaintiff may apply said rents/charges or additional rent to the repairs/alterations/replacement of the common roof at the premises known as 2080 Hillside Avenue, New Hyde Park, New York until such time as the cost of the aforesaid common roof repairs is paid in full, the Court makes the following findings.

Generally, the obligation to pay rent is not suspended so long as the tenant remains in possession, even if the landlord fails to provide essential services, or unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold its rent. *See Westchester County Industrial Development Agency v. Morris Industrial Builders*, 278 A.D.2d 232, 717 N.Y.S.2d 219 (2d Dept. 2000). A landlord's breach of covenant is a breach independent of the tenant's covenant to pay rent. *See Dave Herstein Co. v. Columbia Pictures Corp.*, 4 N.Y.2d 117, 172 N.Y.S.2d 808 (1958).

As there is no provision in the subject Lease Agreement declaring the circumstances under which plaintiff may withhold its rent, along with the fact that plaintiff has remained in possession of the subject premises, plaintiff's motion (Seq. No. 01) for an order authorizing it to withhold paying future rent and any other leasehold charges or additional rent to defendant and directing that plaintiff may apply said rents/charges or additional rent to the repairs/alterations/replacement of the common roof at the premises known as 2080 Hillside Avenue, New Hyde Park, New York until such time as the cost of the aforesaid common roof repairs is paid in full is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on May 6, 2013, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 19, 2013