

Giunta's Meat Farms, Inc. v Pina Constr. Corp.

2014 NY Slip Op 30735(U)

February 28, 2014

Supreme Court, Suffolk County

Docket Number: 4555-09

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 6-27-13
SUBMITTED: 6-27-13
MOTION NO.: 014-MOT D

_____ x
GIUNTA'S MEAT FARMS, INC.,

Plaintiff,

-against-

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**PINA CONSTRUCTION CORPORATION,
ANTONINO MILITELLO, ELIO ZANONI,
ESQ., THE STOP & SHOP SUPERMARKET
COMPANY, LLC, and MARSHALLS OF MA,
INC.,**

Defendants.

_____ x

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Upon the following papers numbered 1-69 read on this motion for summary judgment; Notice of Motion and supporting papers 1-41; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 42-55; 56-57 Replying Affidavits and supporting papers 58-69; it is,

ORDERED that the branch of the motion by Stop & Shop Supermarket Company, LLC, which is for summary judgment dismissing the third, fourth, and fifth causes of action insofar as asserted against it is denied; and it is further

ORDERED that the branch of the motion by Stop & Shop Supermarket Company, LLC, which is for summary judgment in its favor on the seventh cause of action insofar as asserted against it is granted to the extent of declaring that the restrictive covenant in the lease-termination and land-use-restriction agreement that is the subject of this action is not void as against public policy; and it is further

ORDERED that the branch of the motion by Stop & Shop Supermarket Company, LLC, which is for summary judgment in its favor on the seventh cause of action insofar as asserted against it is otherwise denied; and it is further

ORDERED that the branch of the motion by Stop & Shop Supermarket Company, LLC, which is for summary judgment in its favor on its cross claims against the defendant Pina Construction Corporation is denied.

The plaintiff (“Giunta”) owns and operates a chain of six supermarkets known as “Giunta’s Meat Farms.” The defendant Pina Construction Corporation (“Pina”) is the owner and landlord of a shopping center located on Route 25A in Miller Place, New York. The anchor tenant in the shopping center was a Waldbaum’s supermarket. When Waldbaum’s vacated the premises, the defendant Antonino Militello, who is the president of Pina, approached the plaintiff about renting the space. In June 2007, the plaintiff and Pina entered into a commercial lease for the premises (the “Giunta lease”), which was not recorded. The Giunta lease was subject to a pre-existing lease that was to expire in 2016 or 2017 between the prior owner of the shopping center and Waldbaum’s predecessor, the A&P (the “A&P lease”)¹. The Giunta lease was contingent upon Pina terminating the A&P lease and delivering the space to the plaintiff vacant and “legally free” from Waldbaum’s tenancy. After the Giunta lease was executed, Waldbaum’s assigned the A&P lease to the defendant Stop & Shop Supermarket Company, LLC (“Stop & Shop”), which operated a supermarket in the same area. In February 2008, Pina entered into a lease-termination and land-use-restriction agreement with Stop & Shop (the “Stop & Shop agreement”) for which Pina received \$850,000. The Stop & Shop agreement terminated the A&P lease and provided that the premises not be used as a supermarket or food store and that such restriction be a covenant that runs with the land. Pina then leased the space to the defendant Marshalls of MA, Inc. (“Marshalls”). The plaintiff, who intended to open a Giunta’s Meat Farms supermarket thereon, demanded that Pina deliver the premises to it pursuant to their lease. When

¹Waldbaum’s is a subsidiary or affiliate of the Great Atlantic & Pacific Tea Company, Inc. (the “A&P”).

Pina refused, the plaintiff commenced this action, inter alia, for breach of contract and specific performance.

The plaintiff has asserted causes of action against Stop & Shop for tortious interference with the Giunta lease, for conspiracy to tortiously interfere with the Giunta lease, and for aiding and abetting tortious interference with the Giunta lease, respectively. The gravamen of all three causes of action is that Stop & Shop, acting in concert with Militello and the defendant Elio Zanoni, caused Pina to breach the Giunta lease. Stop & Shop moves, inter alia, for summary judgment dismissing those causes of action insofar as they are asserted against it.

The elements of a cause of action for tortious interference with contract are (1) the existence of a contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to the plaintiff (**Kronos, Inc. v AVX Corp.**, 81 NY2d 90, 94). In support of summary judgment, Stop & Shop contends there is no evidence in the record that it had knowledge of the Giunta lease when it entered into the lease-termination and land-use-restriction agreement with Pina.

The court's main function on a motion for summary judgment is issue finding rather than issue determination (**Sillman v Twentieth Century-Fox Film Corp.**, 3 NY2d 395, 404). Since summary judgment is a drastic remedy, it should not be granted when there is any doubt as to the existence of a triable issue (**Rotuba Extruders, Inc. v Ceppos**, 46 NY2d 223, 231). In reviewing a motion for summary judgment, the court must accept as true the evidence presented by the nonmoving party and must deny the motion if the existence of an issue of fact is even arguable or debatable (**Kuang v Board of Managers of the Biltmore Towers Condominium Assoc.**, 22 Misc 3d 854, 865 [and cases cited therein], *affd* 70 AD3d 1004). Applying these principles, the court finds that, contrary to Stop & Shop's contention, there is a triable issue of fact as to whether Stop & Shop knew about the Giunta lease.

Stop & Shop contends that there is no evidence in the record that it acted with malice or with an intent to harm the plaintiff. Malice or an intent to harm is not an element of a claim for tortious interference with an existing contract. When the alleged interference is with prospective contractual relationships, rather than an existing contract, the plaintiff must show that the defendant interfered with the plaintiff's business relationships either for the sole purpose of harming the plaintiff or by means that were wrongful or improper (**Out of the Box Promotions, LLC v Koschitzki**, 55 AD3d 575, 577). Giunta has not asserted a claim for tortious interference with prospective contractual relationships against Stop & Shop or any of the other defendants. Thus, the lack of evidence of malice or of an intent to harm is of no moment.

Stop & Shop further contends that it cannot be liable to the plaintiff because it was motivated by economic self-interest. The economic-self-interest defense applies when the defendant acted to protect its own legal or financial stake in the breaching party's business (**White Plains Coat & Apron Co., Inc. v Cintas Corp.**, 8 NY3d 422, 426). It does not apply to a defendant who is simply the plaintiff's competitor. Mere status as the plaintiff's competitor is not a legal or financial stake in the breaching party's business that permits a defendant to induce a breach of contract (**Id.**). Stop & Shop and the plaintiff were competitors. There is no evidence in the record that Stop & Shop had a legal or financial interest in the plaintiff's business. Accordingly, the economic-self-interest defense does not apply.

In view of the foregoing, the branch of the motion by Stop & Shop which is for summary judgment dismissing the third, fourth, and fifth causes of action insofar as they are asserted against it is denied.

Stop & Shop also moves summary judgment in its favor on the seventh cause of action, which seeks a judgment declaring, inter alia, that the restrictive covenant in the Stop & Shop agreement is superceded by the Giunta lease and void as against public policy. Stop & Shop contends that it is a good-faith purchaser for value and, as such, its agreement with Pina has priority over the Giunta lease, which was not recorded. Stop & Shop also contends that the restrictive covenant is the type of restriction that is commonly and routinely upheld in New York.

New York's Recording Act protects a good-faith purchaser for value from an unrecorded interest in real property provided that such purchaser's interest is the first to be duly recorded (*see*, Real Property Law § 291; **Yen-Te Hsueh Chen v Geranium Dev. Corp.**, 243 AD2d 708, 709). The term "purchaser" includes every person to whom an estate or interest in real property is conveyed for valuable consideration, including the assignee of a lease (Real Property Law § 290 [2]). The status of good-faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property or by one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning a prior interest or equity in the property (**Yen-Te Hsueh Chen v Geranium Dev. Corp.**, *supra*). Whether a party has actual or inquiry notice of a competing interest is a relevant consideration in determining if that party is a bona fide purchaser entitled to the protection of the Recording Act (**Ward v Ward**, 52 AD3d 919, 920). As previously noted, there is a triable issue of fact as to whether Stop & Shop knew about the Giunta lease. It, therefore, cannot be determined as a matter of law whether Stop & Shop is a good-faith purchaser for value and, therefore, whether the Stop & Shop agreement has priority over the Giunta lease.

In opposition to Stop & Shop's argument that the restrictive covenant is void as against public policy, the plaintiff relies on **Putnam Downtown, LLC v Stop & Shop Supermarket Co.** (33 Conn L Rptr 319). In that case, Stop & Shop, which leased space in a Connecticut shopping center owned by Putnam Downtown, LLC ("Putnam"), abandoned the

space, opened a new supermarket two miles away, continued to make payments on the abandoned space, and exercised options to extend the lease for successive periods. A covenant in the lease restricted the plaintiff from leasing the space to any other supermarket in the shopping center. Putnam filed a three-count complaint alleging that Stop & Shop had violated the Connecticut Unfair Trade Practices Act (“CUTPA”). Stop & Shop moved to strike count two, which alleged that it had engaged in unfair methods of competition, violating CUTPA, by leaving the leased space closed for business while holding Putnam to the terms of the lease, thereby suppressing competition. The Connecticut Superior Court found that Putnam had a legally sufficient cause of action under CUTPA because it alleged a violation of public policy that fell within the rubric of CUTPA’s cigarette rule.²

The court finds that **Putnam** is limited to its facts and that it does not change the well-settled rule in New York that a landlord may, by express provisions in a lease, limit and restrict the use of a building for a specific purpose. The landlord has a legal right to control the uses to which his building may be put and may do so by appropriate provision in the lease (**30-88 Steinway St. v Bohack Co.**, 65 Misc 2d 1076, 1078 [and cases cited therein]). Thus, a restriction limiting a building’s use to an exclusive specified purpose will be upheld (**Id.**).

When, as here, a party seeking a declaratory judgment does not succeed, the court is required to declare the rights of the parties and not merely to deny the declaratory relief (*see*, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3001:22). Dismissal is not appropriate (*see*, Siegel, NY Prac § 440, at 770 [5th ed]). Accordingly, the court finds that the restrictive covenant in the Stop & Shop agreement is not void as against public policy.

Finally, Stop & Shop moves for summary judgment on its cross claims for indemnification against Pina. A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purposes of the entire agreement and from the surrounding facts and circumstances (**Drzewinski v Atlantic Scaffold & Ladder Co.**, 70 NY2d 774, 777). Pina represented and warranted in the Stop & Shop agreement that the agreement was superior to all other liens and encumbrances on the premises, other than the existing mortgage, and agreed to defend and indemnify Stop & Shop with respect thereto and to take all actions necessary to insure that its representation and warranty remained intact. Pina also agreed to indemnify Stop & Shop if it defaulted under any of the provisions of the Stop & Shop agreement and to pay reasonable expenses incurred by Stop & Shop, including attorney’s fees, to enforce performance or observance thereof. The court finds the language of the Stop & Shop agreement clearly indicates an intention to indemnify. However, as previously noted, it

² In determining whether a practice violates CUTPA, the courts have adopted the criteria set out in the cigarette rule by the Federal Trade Commission for determining when a practice is unfair. A violation of CUTPA may be shown by establishing either an actual deceptive practice or a practice amounting to a violation of public policy (**Putnam**, *supra* at *2).

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cannot be determined as a matter of law whether the Stop & Shop agreement has priority over to the Giunta lease. It, therefore, cannot be determined as a matter of law that Pina breached the warranty and must indemnify Stop & Shop therefor. Accordingly, the branch of the motion by Stop & Shop which is for summary judgment on its cross claims for indemnification is denied.

Dated: February 28, 2014

HON. ELIZABETH HAZLITT EMERSON

J.S.C.