

Symbol Tech., Inc. v Global Tissue Group, Inc.

2014 NY Slip Op 31022(U)

April 17, 2014

Sup Ct, Suffolk County

Docket Number: 10805-2010

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 12-17-2013
Motion Submit Date: 12-17-2013
Motion Sequence No.: 002 MOTD
003 MD

[] Final
[X] Non Final

_____ X
SYMBOL TECHNOLOGIES, INC.,

Plaintiff,

- against -

GLOBAL TISSUE GROUP, INC.,
Defendants.

_____ X

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ORDERED that the plaintiff's motion for partial summary judgment (Mot. Seq. 002) and the defendant's motion for summary judgment (Mot. Seq. 003) are decided as set forth herein.

On or about January 10, 2003, Plaintiff Symbol Technologies, Inc. ("Symbol"), as Sublandlord, entered into a Sublease with defendant Global Tissue Group, Inc. ("Global"), as Subtenant, for commercial property located in Bohemia, New York. The Sublease identifies the Prime Landlord and identifies an Agreement of Lease dated April 7, 1993, and subsequent

amendments thereto as the Prime Lease. Symbol is Tenant under the Prime Lease.

The Prime Lease provides, in relevant part:

REPAIRS, MAINTENANCE, FLOOR LOADS AND RESTRICTIONS

8. (a) During the term of this Lease Landlord shall make all structural repairs to the roof, exterior walls and foundation of the Premises . . . Tenant shall at all times keep and maintain the Premises in good order, condition and repair, shall make all other repairs required to the Premises not required to be made by the Landlord, including without limiting the generality of the foregoing, (i) maintenance and repair of the electrical, heating, plumbing, sprinkler and air-conditioning facilities in the Premises; (ii) generally keeping and maintaining the Premises in good repair and condition; (iii) keeping the premises clean and free of debris Tenant shall at all times obtain and keep in full force and effect for the benefit of Landlord and Tenant, with a responsible company doing business in Suffolk County, a service, repair, and maintenance contract with respect to the heating, ventilation and air-conditioning systems of the Premises If Tenant fails to make any repairs or replacements required to be made by Tenant, Landlord may perform same for the account of Tenant at tenant's expense and the cost thereof shall be due and payable by Tenant to Landlord as Rent.

* * *

END OF TERM

25. (a) On the last day of the term hereof or on the earlier termination thereof, Tenant shall peaceably and quietly, leave, surrender and deliver the premises up to the Landlord, broom clean, together with any and all alterations, changes, additions and improvements which may have been made upon the Premises in good repair and good order and safe condition except for reasonable wear and tear

Additionally, the Prime Lease, as modified, obligated Symbol to “maintain the exterior, the parking lot, sidewalk, driveways and landscaping on, about, or serving the Premises in good order and repair, including snow removal and sweeping.” (Paragraph 2.1.8 of Second Lease

Modification and Extension Agreement dated May 6, 1999.

The Sublease between Symbol and Global provides, in relevant part:

9. SUBTENANT'S OBLIGATIONS. Subtenant shall be responsible for, and shall pay the following:

(A) All maintenance, repairs and replacements as to the Premises and its equipment, to the extent Sublandlord is obligated to perform the same under the Prime Lease.

* * *

17. SURRENDER. Upon the expiration of this Sublease . . . Subtenant will at once surrender and deliver up the Premises, together with all improvements thereon, to Sublandlord in good condition and repair, reasonable wear and tear excepted; conditions existing because of Subtenant's failure to perform maintenance, repairs or replacements a required of Subtenant under this Sublease shall not be deemed "reasonable wear and tear." Said improvements shall include all plumbing, lighting, electrical, heating, cooling and ventilating fixtures and equipment and other articles of personal property used in the operation of the Premises (as distinguished from operations incident to the business of Subtenant) . . . All Alterations in or upon the Premises made by Subtenant shall become a part of and shall remain upon the Premises upon such termination without compensation, allowance or credit to Subtenant provided, however, that Sublandlord shall have the right to require Subtenant to remove any Alterations made by Subtenant, or portion thereof if the Prime Landlord, pursuant to the terms of the Prime Lease, has the right to require and requires that such Alterations be removed . . . In any such event, Subtenant shall restore the Premises to their condition prior to the making of such Alteration, repairing any damage occasion by such removal or restoration . . . As between Sublandlord and Subtenant, Subtenant shall not be required to remove any Alterations performed by Sublandlord prior to the Commencement Date or to restore the Premises to their condition prior to the making of such Alterations. If, however, the term of the Sublease expires at or about the date the expiration of the Prime Lease, and if Sublandlord is required under the terms of the Prime Lease to remove any Alterations performed prior to the Commencement Date, Subtenant shall permit Sublandlord to enter the Premises for a reasonable period of

time prior to the expiration of the Sublease for the purpose of removing its Alterations and restoring the Premises as required, in which event Sublandlord shall provide Subtenant with thirty (30) days prior written notice of the date Sublandlord requires entry to the Premises for the purpose of removing such Alterations and this Sublease shall terminate on the date set forth in such notice with the same force and effect as if such date were the Expiration Date of this Sublease.

* * *

21. INDEMNITY. Subtenant agrees to indemnify Sublandlord and hold Sublandlord harmless from all losses, damages, liabilities and expenses which Sublandlord may incur, or for which Sublandlord may be liable to Prime Landlord, arising from the acts or omissions of Subtenant which are the subject matter of any indemnity or hold harmless of Sublandlord to Prime Landlord under the Prime Lease.

* * *

34. SUBLANDLORD WORK. Sublandlord agrees to complete the work set forth on Schedule "A" annexed hereto at its own cost and expense . . .

Schedule "A" annexed to the Sublease is a "Work Statement" detailing the renovation work to be performed by Sublandlord. Otherwise, Symbol agreed to deliver possession of the premises "AS IS" as of the execution and delivery of the Sublease, reasonable wear and tear excepted.

On or about February 12, 2003, the Prime Landlord granted its consent to the Sublease subject to certain conditions and provisions contained in an agreement ("Consent Agreement") executed by the Prime Landlord, Symbol, and Global. The Consent Agreement provides, in relevant part:

It is expressly agreed and acknowledged by Tenant and Subtenant that Subtenant shall assume all of the obligations of Tenant under the Overlease as such obligations affect the space to be sublet to Subtenant pursuant to the Sublease ("Subleased Premises").

It is undisputed that Symbol made certain alterations to the Premises before Global took possession in March 2003.

By letter dated January 27, 2009, the Prime Landlord advised Symbol that it had inspected the Premises and, in accordance with the provisions of the Prime Lease, it demanded that Symbol perform enumerated maintenance, repair and restoration work on or before the termination of the Prime Lease on August 31, 2009, to the site, building exterior, building systems, building interior, and alterations as per the Sublease.

By letter from counsel dated August 19, 2009, Symbol advised Global, among other things, that upon the expiration of the term of the Sublease on August 30, 2009, Symbol was obligated to surrender possession with all improvements in good condition and repair.

Additionally, the letter states, in relevant part:

As more fully described below and in prior notices to Subtenant, there is a significant amount of restoration work that must be performed at the Property, some of which is the Subtenant's responsibility (see item 2 below) and some of which is [Symbol's] responsibility. Pursuant to the letter agreement dated February 12, 2003 among Prime Landlord, Sublandlord and Subtenant, [Symbol] must complete its restoration of the Property within 90 days following the end of the Term. Otherwise, Prime Landlord may complete the restoration at Tenant's expense. The Prime Landlord's estimate for such work substantially exceeds [Symbol's] estimate. Accordingly, if Subtenant fails to vacate the Property and surrender possession by the Expiration Date and [Symbol] fails to complete the require restoration work, Prime Landlord will perform the work at the higher cost. Thus Subtenant's failure to surrender the premises on the Expiration Date will cause [Symbol] to incur this additional expense for which Subtenant will be liable to [Symbol], in addition to Subtenant's liability for its restoration costs.

On September 1, 2009, Symbol commenced a holdover proceeding in District Court,

Suffolk County against Global. According to the Verified Petition in that proceeding, Symbol sought a judgment awarding it possession and awarding it a money judgment against Global for use and occupancy of the Premises.

On September 4, 2009, the Prime Landlord commenced a holdover proceeding in District Court against Symbol and Global. According to the Verified Petition, the Prime Landlord sought a judgment awarding it possession and awarding it a money judgment against Symbol and Global for use and occupancy of the Premises.

On March 2, 2010, following a bench trial on the Prime Landlord's holdover petition and Symbol's cross-claim for holdover against Global, the Fifth District Court (Flanagan, J.) issued its decision which states, in relevant part:

As for the respondent Symbol . . . the court finds that the petitioner proved by a fair preponderance of the evidence that the respondent Symbol held over in possession of the demised premises after the termination of the Lease on August 31, 2009.

* * *

As for the respondent Global, who is the sub-tenant under the Sublease with Symbol, the petitioner cannot maintain a summary proceeding directly against Global. Nevertheless, said subtenant is a proper party who can be joined in this proceeding to afford the petitioner complete relief, i.e., recovery of possession of the demised premises (*see 2 Dolan, Rasch's Landlord and Tenant, 4th Ed., §9:60; §38:16; and §38:30*) . . . The Consent to Sublease executed by the parties does not, in the opinion of the court, create a privity of contract between the [Prime Landlord] and Global. The Consent to Sublease merely binds Global to the obligations of Symbol under the Lease as such obligations *affect* the space to be sublet. This only means that Global is bound in occupancy by the covenants of the Lease, i.e., for such covenants as maintenance and repair, alterations, utilities, etc.

As to the cross-claim holdover petition by Symbol against Global, the court finds that Symbol failed to make out a prima

facie case on the cross-claim. In this regard Symbol did not present any testimony or offer any proof to establish any elements of its cross-claim for holdover against Global. The only evidence submitted at trial was the Sublease. There was no testimony or proof that Global held over in possession after the termination of the Sublease and/or to establish that Global was liable for any rent or use and occupancy to Symbol.

Accordingly, petitioner is granted a judgment of possession and warrant of eviction against Symbol and Global. The warrant shall issue without stay. Petitioner is granted a judgment against Symbol for holdover rents in the aggregate amount of \$249,873.39, additional holdover rents for real estate taxes in the aggregate amount of \$13,362.96 and for reasonable attorney's fees of \$25,000.00 for a combined total judgment of \$288,236.35, plus costs and disbursements . . . Judgment is granted in favor of Global dismissing the cross-claim.

On March 22, 2010, the Prime Landlord commenced an action in this court against Symbol for breach of the Prime Lease. The Prime Landlord alleged, among other things, that Symbol breached the Prime Lease by failing and refusing to perform certain work, repairs, replacements and restoration work to the premises during the term of the Prime Lease and before it surrendered possession.

On July 27, 2010, Symbol commenced a third-party action against Global for breach of the Sublease and Consent Agreement, contractual indemnity, common law indemnity, and interference with contract. Symbol alleges, among other things, that Global failed to restore the premises to its condition prior to the performance of alterations to the premises. Symbol also claims that Global failed to keep, maintain and/or repair the premises in accordance with its obligations under the Sublease. Symbol alleges that Global repudiated the Sublease and Consent Agreement by failing to respond to Symbol's requests to Global to restore the premises and by refusing to permit Symbol entry onto the premises. Symbol claims that by preventing and/or

interfering with Symbol's access to the premises, Global made Symbol's performance of its obligations under the Prime Lease impossible. Symbol seeks money damages against Global. Global served a answer to the third-party complaint in which it denied the material allegations and asserted several affirmative defenses, including the doctrines of res judicata/collateral estoppel.

In May 2012, the Prime Landlord and Symbol entered into a settlement agreement and the Prime Landlord discontinued the main action. The third-party action by Symbol against Global was severed and continued under the original index number, with a corresponding amendment of the caption.

Symbol now moves (Mot. Seq. 002) for an order granting it summary judgment against Global on the issue of liability and scheduling a hearing on damages. In support of its motion Symbol submits, among other things, an affirmation from counsel, affidavits from three of its former employees, and an affidavit from a representative of the Prime Landlord. The affidavits provide detailed descriptions, as well as photographs, of what Symbol claims are the damages to the premises caused by Global's failure to maintain and/or repair, including damage to, among other things, the curbing in the parking lot, asphalt, air conditioning system, fire alarm system, windows, sprinkler system, loading dock, lawn/landscaping.

Symbol's submits an extensive and detailed nine-page affidavit from Joseph Carbone, a maintenance mechanic employed by Symbol, who oversaw the property at issue from 1995-2003. Mr. Carbone states, among other things, that in 2009 he observed damage to the Premise caused by Global that was not present when Global's occupancy began in 2003. Symbol also provides an affidavit from Joe Sanda, a former employee of Symbol who inspected the Premises on three

in occasions in 2009 on behalf of Symbol. Mr. Sanda observed the building to be in a state of disrepair and he took numerous photographs depicting the damage he observed, copies of which are annexed to Symbol's motion papers. Mr. Sanda describes the damages depicted in the photographs. Symbol also provides an affidavit from Frank Lanzarone, a manager in Symbol's real estate department from 2001-2007. Mr. Lanzarone states, among other things, that when Symbol vacated the Premises for Global's occupancy, the premises was in good condition. Mr. Lanzarone also describes, in detail, damages Global caused to the Premises. Symbol also provides copies of Code Violations issued by the Town of Islip Code Enforcement Division, Fire Prevention Bureau for the Premises in 2005 and 2009. Symbol also provides correspondence in 2003 notifying Global of its failure to maintain the property by watering the lawn and invoices from 2005 documenting landscaping service performed by the Prime Landlord due to Global's neglect of the Premises. Symbol also provides a 17-page affidavit from Mark O'Loughlin, an employee of Rechler Equity Partners, the Prime Landlord's affiliate, who was charged with the management of the Premises for the Prime Landlord. Based upon his inspections of the Premises in 2003 before Global moved in, several inspections during Global's occupation, and inspections when Global vacated the Premises in 2009, he describes, in extensive detail, damage to the Premises caused by Global. Mr. O'Loughlin also provides a 22-page Summary Property Condition Report with exhibits of the Premises prepared in 2003 by Terracon on behalf of the Prime Landlord, which found the Premises to be in generally good to fair condition. Symbol also provides a 29-page Property Condition Assessment Report prepared in 2010 by ATC Associates Inc. at the request of the Prime Landlord which, based upon document reviews, interviews, and filed observations, concludes that the Premises was not well maintained and was in overall fair to

poor condition

Global opposes Symbol's motion and also moves (Mot. Seq. 003) for an order granting it summary judgment dismissing the third-party complaint. Global contends, among other things, (1) that the claims asserted by Symbol in the third-party complaint were litigated in the holdover proceeding in District Court and, therefore, are barred by the doctrine of res judicata; (2) Symbol's denials in its answer to the complaint in the main action by the Prime Landlord constitute admissions which bar its claims against Global; and (3) that Symbol's voluntary settlement of the claims asserted against it by the Prime Landlord bar Symbol's claims against Global for indemnification.

In a four-page affidavit in opposition to Symbol's motion, Elnekaveh Freydoun, Global's Chief Executive Officer, generally refutes the allegations regarding damages to the Premises caused by Global made in the affidavits submitted by Symbol in support of its motions. Mr. Freydoun states, among other things, that Global operated a "clean" business and that Symbol's claims about the condition of the Premises are simply untrue. He states, generally, that the photographs submitted by Symbol in support of its motion do not depict the condition of the Premises when Global was in occupancy and he concludes that Symbol or the Prime Landlord must have ransacked the Premises after Global vacated it. He states that Symbol destroyed the HVAC system and never fixed it and that the "parking lot issues were created by the Landlord's own inspection and environmental testing teams, and not by Global." Mr. Freydoun also disputes Symbol's allegations that Global caused damage to the exterior of the Premises, windows, landscaping, and a roof leak.

Symbol opposes Global's motion for summary judgment arguing, among other things, (1)

that the claims asserted by Symbol in the instant action, including whether Global breached the Sublease and Consent Agreement by failing to maintain and/or repair the Premises and/or by failing to restore the Premises, were not adjudicated in the prior District Court holdover proceeding and, therefore, are not barred by res judicata; (2) that its denials of allegations against it made by the Prime Landlord do not constitute admissions that Global did not breach the Sublease and Consent Agreement; (3) that the settlement of the claims asserted against it by the Prime Landlord does not bar its indemnification claims; and (4) that Global failed to demonstrate, as a matter of law, that it complied with its obligations under the Sublease and Consent Agreement.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). “Bald conclusory assertions, even if believable, are not enough (to defeat summary judgment)” (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 342 [1974] quoting *Ehrlich v American Monger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

“The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant’s failure to perform,

(4) resulting damage” (2 NY PJI2d 4:1, at 676 [2013]). “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Geenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 [2002]).

Here, Symbol has failed to make a prima facie showing of entitlement to judgment as a matter of law on its first cause of action for breach of contract based on Global’s purported failure to restore the Premises to its pre-alteration condition. Although it is undisputed that Symbol performed certain alterations to the Premises at Global’s request before Global took possession, pursuant to paragraph 17 of the Sublease, Global is not required to remove alterations performed by Symbol or to restore the Premises to its condition prior to the making of such alterations. Symbol has not offered any evidence demonstrating that Global itself performed alterations to the Premises that it is obligated to remove and restore under paragraph 17 of the Sublease. Similarly, Global has failed to make a prima facie showing of entitlement to judgment as a matter of law dismissing the first cause of action as it has failed to provide any evidence showing that it did not perform alterations to the Premises that it was obligated to remove and restore pursuant to the Sublease. Accordingly, both parties are denied summary judgment with regard to the first cause of action.

However, the Court finds that through the detailed affidavits of its former employees as well as a representative of the Prime Landlord, and the contemporaneous documentation and reports of the condition of the Premises, Symbol has made a prima facie showing of entitlement to judgment as a matter of law on the issue of liability on its second cause of action alleging that Global breached the Sublease by failing to keep, maintain and/or repair the Premises as required by paragraph 9(A) thereof. As noted above, the affidavits and reports submitted by Symbol

provide extensively detailed descriptions, as well as photographs, of damage to, among other things, the curbing in the parking lot, asphalt, air conditioning system, fire alarm system, windows, sprinkler system, loading dock, lawn/landscaping, that did not exist when Global took occupancy in 2003. In opposition, Global has failed to provide evidentiary proof sufficient to establish material issues of fact, as the affidavit of Mr. Freydoun contains only bald, conclusory allegations that Global adequately maintained and repaired the Premises and did not cause the damages depicted in the photographs. Mr. Freydoun fails to specifically address the detailed descriptions of damages to the Premises described in the affidavits and 2003 and 2010 property condition reports, and depicted in the numerous photographs and, therefore, his affidavit is insufficient to overcome Symbol's prima facie showing. Accordingly, Symbol is granted summary judgment on its second cause of action on the issue of liability. The issue of damages sustained by Symbol as a result of Global's failure to keep, maintain and/or repair the Premises will proceed to trial.

With regard to Symbol's indemnity claims (third and fourth causes of action), both motions for summary judgment are denied. Settlement with a prime plaintiff by an indemnity plaintiff does not require dismissal of the third-party indemnity claims, but imposes on the indemnity plaintiff the obligation to establish (1) that it was liable to the prime plaintiff, (2) that its liability was such that it could recover over against the indemnity defendant, and (3) that the settlement was reasonable in amount (*Hain v Hewlett Arcade, Inc.*, 40 AD2d 991 [2d Dept 1972]). Here, Symbol has not established, as a matter of law, that it was liable to the Prime Landlord, that its liability arose from the acts or omissions of Global, and that the amount of the settlement between the Prime Landlord and Symbol was reasonable. No evidence has been

submitted detailing the nature of the Prime Landlord's claims against Symbol and the basis for Symbol's liability therefor. Nor has any evidence been offered to substantiate that the amount of the settlement was reasonable. Similarly, Global has not demonstrated, as a matter of law, that it cannot be held liable on the indemnity claims. Therefore, both parties are denied summary judgment on these claims.

With regard to the fifth cause and sixth causes of actions alleging that Global repudiated the Sublease and Consent Agreement, neither Symbol nor Global have made a prima facie showing of entitlement to judgment as a matter of law. Neither party specifically addresses these causes of action in their motion papers. Accordingly, both parties are denied summary judgment with regard to the fifth and sixth causes of action.

Contrary to Global's contention, the claims asserted in this action are not barred by the doctrine of res judicata. "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Abraham v Hermitage Ins. Co.*, 47 AD3d 855 [2d Dept 2008]). Here, the District Court lacked subject matter jurisdiction in the summary proceeding to entertain Symbol's damages claims raised in this plenary action (*see* Uniform Dist Ct Act § 204; *Ross Realty v V & A Fabricators, Inc.*, 42 AD3d 246, 250 [2d Dept 2007]). In the summary proceeding, the District Court had jurisdiction to entertain claims to recover possession of real property, to remove tenants therefrom, and to render judgment for rent due. The claims raised by Symbol in this action seek contractual damages not recoverable in a summary proceeding. However, in light of the District Court's finding that Symbol failed to make out a

prima facie case on its cross-claim for holdover against Global, Symbol is precluded from claiming in this action that Global held over.

Finally, Symbol's denials of allegations made against it by the Prime Landlord in the main action do not constitute admissions which bar its claims against Global, as the Prime Landlord's allegations were directed at Symbol's acts and/or omissions, not Global's.

This constitutes the *DECISION* and *ORDER* of the Court.

Dated: April 17, 2014
Riverhead, New York



EMILY PINES
J. S. C.