

Carey & Assoc. LLC v 521 Fifth Ave. Partners, LLC

2014 NY Slip Op 31090(U)

April 25, 2014

Sup Ct, New York County

Docket Number: 650165/08

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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CAREY & ASSOCIATES LLC,

Plaintiff,

-against-

521 FIFTH AVENUE PARTNERS, LLC, et al.,

Defendants.
-----X

DECISION AND
ORDER

Index No.
650165/08

HON. ANIL C. SINGH, J.:

Defendants move for summary judgment dismissing the complaint pursuant to CPLR 3212; for sanctions pursuant to CPLR 3126 and NYCRR section 130-1.1(a); and for an award of attorneys’ fees. Plaintiff opposes the motion and cross-moves for partial summary judgment on the first through fourth causes of action, and an award of plaintiff’s costs, disbursements, attorneys’ fees, and interest.

Plaintiff, the law firm Carey & Associates, LLC, commenced the instant action by filing a summons and complaint on May 30, 2008. Plaintiff, which is self-represented, alleges the following facts in the second amended complaint.

Plaintiff, as tenant, executed a written commercial lease agreement with defendant 521 Fifth Avenue Partners, LLC (“521 Partners”), as landlord, dated January 7, 2003, for premises to be used as law offices on the 33rd floor of 521

Fifth Avenue in Manhattan. The rent commencement date was March 22, 2003.

Pursuant to the lease, the landlord was to renovate the premises for occupancy by plaintiff based upon construction drawings and plans approved by plaintiff.

Plaintiff alleges that the landlord failed to substantially complete construction prior to the commencement date. Specifically, the landlord promised that the premises would be ready for occupancy by March 21, 2003.

By letter dated March 21, 2003, the landlord notified plaintiff that the landlord's work was substantially completed and you accepted possession of the [premises] as of March 21, 2003. ("substantial completion letter").

The Vice-President, Construction, for defendant RFR Realty delivered the substantial completion letter to plaintiff for his signature. Plaintiff signed the substantial completion letter on March 21, 2003. He moved into the premises the evening of March 21, 2003.

On March 23, 2003, plaintiff sent an e-mail to the landlord with a four-page punch list describing 52 matters in landlord's work that had not been completed, or were completed but not in a good and workmanlike manner. Four days later, plaintiff sent a revised punch list of 74 matters. The punch list stated, among other things, that the carpeting was installed improperly; the ceiling was sagging; the doors were not primed or installed properly; and the walls were plastered

unevenly.

During the next 3.25 months, the landlord performed work on the premises to correct the deficiencies on the punch list.

Plaintiff alleges that contractors interrupted plaintiff's work; trash was not removed; the foyer in the premises was painted and wallpapered; there were problems with the air conditioning system; the top of a conference room table was not delivered to the premises until June 20, 2003; and plaintiff's name was not listed in the building's tenant directory until July 8, 2003. Further, the work impaired plaintiff's earnings from office rentals; caused plaintiff to incur added costs to move its conference table into the premises; and materially interfered with plaintiff's normal business use of the premises.

The complaint as amended asserts seven causes of action. The first cause ("Breach of Contract – Rent Overcharge") alleges that, by doing the renovations after the rent commencement date, the landlord reduced by approximately 3.25 months the length of time plaintiff could occupy the premises as intended prior to the lease expiration date. The second cause of action ("Breach of Contract – Actual and Constructive Eviction") alleges that the actions of the landlord substantially and materially deprived plaintiff of the beneficial use, enjoyment and actual possession of the premises. The third cause of action ("Breach of Contract

– Covenant of Quiet Enjoyment”) reiterates the allegation that the acts of the landlord constituted an actual and constructive eviction. The fourth cause of action (“Unjust Enrichment”) alleges that the landlord wrongfully denied plaintiff “the material portion of the premises” for approximately 3.25 months. The fifth cause of action (“Negligence and Negligent Misrepresentation”) alleges that the defendants had a duty to ensure that the landlord’s work was done in a good and workmanlike manner, and the “substantial completion” letter was a negligent misrepresentation by the landlord. The sixth cause of action (“Successor Liability”) alleges that defendant 521 Partners is “an empty, judgment-proof shell.” The seventh cause of action (“Breach of Contract – Additional Rent”) alleges that the landlord overcharged plaintiff for operating expenses, electricity and other additional rent.

The complaint lists the following damages:

- a. \$65,600.00 Value of lost use and occupancy
- b. \$1,500.00 Electric charges
- c. \$4,300.00 Late & admin charges and legal fees
- d. \$2,500.00 Advertising expenses
- e. \$24,000.00 Lost license revenue
- f. \$700.00 Conference table move

\$98,700.00 TOTAL

Defendants filed a verified answer, asserting seven affirmative defenses.

Plaintiff has withdrawn its claim alleging constructive eviction and its claim for lost license fees.

Discussion

In its first cause of action (“Breach of Contract – Rent Overcharge”), plaintiff contends that the landlord overcharged rent because the renovations prevented plaintiff from occupying the premises “as intended.”

Plaintiff rented the subject premises to use as law offices. It is undisputed that plaintiff countersigned the substantial completion letter at the premises on March 21, 2003, and began moving into the premises later that same day.

Although the renovations may have inconvenienced plaintiff, the record is devoid of any evidence that such renovations prevented plaintiff from conducting all of the normal activities of a law firm. Accordingly, the Court finds that the landlord is entitled to summary judgment on the first cause of action.

In the second cause of action, plaintiff contends that the landlord’s actions amounted to actual eviction.

“[A]lterations to leased premises, made with the consent of the tenant, do not amount to an eviction, no matter how extensive or the degree of interference

with the tenant's occupancy" (Jackson v. Westminster House Owners Inc., 24 A.D.3d 249, 250 [1st Dept., 2005]). "An actual eviction occurs only when the landlord wrongfully ousts the tenant from physical possession of the leased premises" (74 N.Y.Jur.2d Landlord and Tenant section 293). "To constitute an actual eviction, the wrongful acts of a landlord must result in an actual expulsion of a tenant from the demised premises" (Id.).

Here, the Court finds that the landlord has made out a prima facie showing that it never physically expelled or excluded plaintiff from the premises. Likewise, the record reflects that plaintiff did not vacate the premises. Plaintiff's submission of punch lists to the landlord reflects that plaintiff consented to the work. Because plaintiff has failed to rebut defendant's prima facie showing, plaintiff's claim for actual partial eviction fails (Barash v. Pennsylvania. Term. Real Estate Corp., 26 N.Y.2d 77, 82 [1970]).

Plaintiff has submitted no evidence demonstrating that the landlord ousted, expelled or physically excluded plaintiff from the premises. The Court finds, therefore, that plaintiff has failed to demonstrate the existence of a genuine issue of material fact. Accordingly, the landlord is entitled to summary judgment on plaintiff's cause of action alleging actual eviction.

In the third cause of action, plaintiff contends that the landlord breached the

covenant of quiet enjoyment, as set forth at section 38.1 of the lease agreement.

“If a landlord by his or her acts keep a tenant out, the latter may sue the landlord for breach of the covenant of quiet enjoyment” (74 N.Y.Jur.2d Landlord and Tenant section 232). “[A]lterations to leased premises, made with the consent of the tenant, do not amount to a breach of the covenant of quiet enjoyment” (Id.; see, for example, Reade v. Reva Holding Corp., 30 A.D.3d 229 [1st Dept., 2006] (holding that a landlord did not breach the covenant of quiet enjoyment when a tenant’s business allegedly suffered an interruption and property damage as the result of work performed in an unworkmanlike manner during a construction project by a contractor hired by the landlord)).

In the instant matter, it is undisputed that plaintiff sent punch lists to the landlord demanding the work that was done. In other words, plaintiff clearly consented to the renovation work. Accordingly, the landlord is entitled to summary judgment on the cause of action alleging breach of the covenant of quiet enjoyment.

In the fourth cause of action, plaintiff contends that it is entitled to damages based on a legal theory of unjust enrichment.

“A claim for unjust enrichment that is indistinguishable from a non-viable breach of contract claim cannot be maintained” (22A N.Y.Jur.2d section 545).

Accordingly, the cause of action for unjust enrichment is not viable.

In the fifth cause of action, plaintiff contends that the landlord should be found liable under a theory of negligence and negligent misrepresentation. According to plaintiff, the landlord knew, or should have known, that its contractor failed to perform landlord's work in a good and workmanlike manner; knew, or should have known, that the substantial completion letter misrepresented the condition of the premises; and negligently misrepresented to plaintiff the facts stated in the substantial completion letter. Plaintiff contends that the defendants acted knowingly and willfully, in bad faith, in presenting the substantial completion letter.

The cause of action sounding in negligence is redundant of the breach of contract claims, since it arises from the same allegations and seeks identical relief (Sebastian Holdings, Inc. v. Deutsche Bank, AG., 108 A.D.3d 433 [1st Dept., 2013]).

In the sixth cause of action ("Successor Liability"), plaintiff asserts that ownership of the building and lease was transferred at some point; that defendant 521 Fifth Avenue Partners, LLC, is an empty, judgment-proof shell; and that the co-defendants are liable based on successor liability.

The parties in their moving papers failed to address the issue of successor

liability. Accordingly, the Court declines to award summary judgment regarding that cause of action.

In the seventh cause of action (“Breach of Contract – Additional Rent”), plaintiff contends that defendant 521 Partners charged plaintiff \$4,491 in excess of what plaintiff owed as additional rent, and defendant Green 521 Fifth Avenue, LLC (“Green 521”), charged plaintiff \$29,410 in excess of what plaintiff owed as additional rent. According to plaintiff, it sent a letter to Green 521 dated October 2, 2008, requesting an explanation for the 70% increase in electric charges from 2007 to 2008 for the same monthly period, but Green 521 provided no explanation for the increase.

In the seventh cause of action, plaintiff seeks: a) a judgment declaring the precise legal requirements of the lease regarding additional rent, including rent charges; b) a judgment declaring reformation of the lease to state what was intended regarding the charges for additional rent, including electric; c) an accounting regarding the charges for additional rent, including electric; and d) an award of damages in excess of \$33,900.

The parties in their papers failed to address the seventh cause of action. Accordingly, the Court declines to award summary judgment regarding that cause of action.

Finally, the Court finds that the parties' conduct in the instant matter does not merit the imposition of sanctions or an award of attorneys' fees.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in part, and the first, second, third, fourth, and fifth causes of action of the second amended complaint are dismissed; and it is further

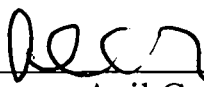
ORDERED that the branch of the motion seeking an assessment of sanctions and the award of legal fees is denied; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 320, 80 Centre Street, on June 18, 2014, at 9:30 AM.

The foregoing constitutes the decision and order of the court.

Date: 4/25/14
New York, New York


Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**