

530 West 28th Street, L.P. v RN Realty LLC

2014 NY Slip Op 32129(U)

August 1, 2014

Sup Ct, New York County

Docket Number: 651709/2010

Judge: Shirley Werner Kornreich

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SHIRLEY WERNER KORNREICH
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

J.S.C.

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530 WEST 28TH STREET, L.P.,

Index No.: 651709/2010

Plaintiff,

DECISION & ORDER

-against-

RN REALTY LLC and NEIL R. SCHWARTZ,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 013, 014, and 015 are consolidated for disposition.

Defendants RN Realty LLC (Landlord) and Neil R. Schwartz move, pursuant to CPLR 3212, for summary judgment against plaintiff 530 West 28th Street, L.P. (Tenant). Seq. 013. Tenant opposes and also moves for partial summary judgment. Seq. 014. Landlord also moves by order to show cause, pursuant to CPLR 3025(b), for leave to file a proposed amended answer. Seq. 015. For the reasons that follow, Landlord's motions are granted and Tenant's motion is denied.

I. Introduction

Tenant commenced this action in 2010 to challenge Landlord's alleged improper refusal to consent to a sublease. The operative pleading, the Amended Complaint (the AC), asserts this claim via causes of action sounding in fraud, breach of contract, tortious interference with prospective economic advantage, breach of the duty of good faith and fair dealing, and defamation. *See* Dkt. 33. In May 2011, Landlord commenced a nonpayment proceeding (L&T Index No. 68861/2011), which was later consolidated with this action. Tenant now seeks summary judgment on its claims that Landlord unreasonably refused to consent to its proposed

sublease while Landlord, who has not been paid rent since December 2010, seeks summary judgment for non-payment of rent. As discussed below, Tenant has submitted no evidence that Landlord engaged in any of the alleged misconduct or that its refusal to consent to the sublease was unreasonable. In fact, the evidence submitted by Landlord proves that the sublease was not executed due to the proposed subtenant's inability to procure a liquor license. While Tenant claims that, behind the scenes, Landlord was somehow responsible for the denial of the subtenant's application, no evidence proving this contention was submitted. Instead, Tenant proffers conclusory allegations unsupported by any actual, admissible evidence. Additionally, Landlord established a clear entitlement to be paid its rent, and thus summary judgment is granted to Landlord.

II. Factual Background

Unless otherwise indicated, the following facts are undisputed.

In 1998, Landlord purchased a building located at 530 West 28th Street in Manhattan (the Property). Defendant Schwartz is the managing member of Landlord. Between 1998 and 2002, Landlord used the property as a warehouse. On January 22, 2002, Landlord entered into a 20-year triple net lease with Tenant¹ for use of the Property as a nightclub. Between 2002 and 2007, Tenant operated a nightclub at the premises under various names (e.g., Crobar, Pink Elephant, Mansion, and Mezmur's Studio). In 2007, Tenant's nightclub was shut down by the New York City Police Department (NYPD) for drug dealing that occurred on the Property. Though

¹ The Lease was originally entered into with an entity now known as "Old 530". Tenant is the successor to Old 530. As explained below, the lease was assumed by Tenant in Old 530's bankruptcy proceedings.

Tenant managed to reopen the nightclub for a short time thereafter, it struggled to make its rent payments under the Lease. On August 21, 2008, Tenant filed for bankruptcy.

On May 26, 2009, the parties entered into a stipulation resolving Landlord's pre-bankruptcy rent claims, whereby Tenant assumed the Lease going forward. The stipulation further provided that the parties were to negotiate a new lease that would not restrict assignments or subleases for any lawful use, except for business "dealing with pornographic material or sexually explicit material." *See* Dkt. 213 at 3.

In July 2009, Tenant sent Landlord a proposed draft of a new lease. *See* Dkt. 214 (redline of proposed new lease with the original 2002 lease). The proposed new lease contained new terms that were unacceptable to Landlord, such as permitted uses of the Property for adult entertainment, such as a strip club, pornography, and peep shows. *See* Dkt. 214 at 11. Landlord rejected the proposed, amended lease, but Tenant continued to occupy the Property.

On August 16, 2010, the NYPD again shut down Tenant's business because of alleged drug dealing on the Property. Tenant, as a result, lost its liquor license. As Tenant could no longer operate a nightclub, it sought to sublease the Property. On September 8, 2010, Tenant sought Landlord's consent to sublease the Property to an entity called 27 New York Entertainment Group, LLC (27NY). 27NY is owned and operated by non-party Robert J. Montwaid. Montwaid, Tenant avers, operated one of Tenant's pre-bankruptcy nightclubs, called Pink Elephant. Landlord had serious reservations about consenting to Montwaid as a subtenant because a Google search of Montwaid indicated that he was one of New York State's largest tax delinquents, owing, at the time, approximately \$500,000 in taxes. On September 13, 2010, Landlord and Tenant met, and it was agreed that Tenant would attempt to arrange a meeting

between Montwaid and Landlord. Given Montwaid's tax issues, Landlord wanted assurances that Montwaid was financially capable of paying rent.² Montwaid scheduled multiple meetings with Landlord, but failed to appear for any of the meetings.³

Montwaid, nonetheless, took steps to pursue a sublease. Most importantly, he applied to Community Board Number Four (CB4) to recommend his approval to the State Liquor Authority (SLA) for a liquor license. However, in a letter to the SLA, dated December 9, 2010, CB4 recommended that 27NY not be issued a liquor license:

[CB4] is significantly concerned about the changing dynamic of the area: what was once a nightclub area is becoming more and more a residential area. There are two developments being built at this moment and a major development project [that] will be underway in April 2011. In fact, there has been strong opposition to the application from property owners who are presently building or will be building residential buildings soon. [CB4] wants to avoid a situation, which has occurred repeatedly in the past, where residents move into the district and end up coming in conflict with large entertainment venues that are better off operating in areas with less of a soon to be residential population.

In addition, there was some concern expressed by small business owners (on the block) who have suffered by the NYPD closing the street on weekend nights and galleries (on the block) concerned over the secondary effects of nightclubs. [CB4] is very sympathetic to long term small business owners in the area whose livelihood suffers because they cannot get to and from their businesses. In addition, given the size of the venue, almost 2000 people, and the surrounding

² Landlord also took the position that the proposed sublease to 27NY was effectively an assignment and, thus, sought an increased security deposit. This issue is immaterial because, as discussed herein, summary judgment is being granted to Landlord on other grounds.

³ It is unclear why Tenant did not depose Montwaid. Though Montwaid testified at a prior use and occupancy hearing, Tenant did not seek his deposition in this action which, perhaps, might have clarified the circumstances of Montwaid's involvement. Tenant, instead, proffers myriad inadmissible hearsay and conclusory statements about Montwaid and other unnamed third-party witnesses. Tenant's reliance on certain quoted testimony from a 2011 hearing before another Justice is no substitute for submitting actual, admissible evidence from discovery. In any event, in light of the other Justice's recusal, this court expressly held that it would not consider testimony from that hearing. *See* Dkt. 237 (4/20/12 Tr. at 17-19).

area ... [CB4] does not believe any stipulation could help mitigate the secondary effects of such an establishment as proposed by the applicant.

See Dkt. 233 at 2-3.⁴ When 27NY's liquor license application was denied, Montwaid ceased pursuing a sublease. Shortly thereafter, in December 2010, Tenant stopped paying rent.

Tenant commenced this action on October 8, 2010, and filed the AC on November 8, 2010. In April 2012, this action was transferred to this Justice after the recusal of the prior Justice. In an order dated April 20, 2012 (Dkt. 120), Tenant was ordered to make monthly use and occupancy payments during the pendency of this action. In response, Tenant filed another bankruptcy petition. See Dkt. 141. The case was temporarily stayed due to removal to bankruptcy court. However, in an order dated February 25, 2013, the bankruptcy court dismissed the Chapter 11 case with prejudice. See Dkt. 170.⁵ Discovery resumed in this court upon remand. Tenant filed a Note of Issue on March 24, 2014, and the instant summary judgment motions followed.⁶

⁴ Tenant alleges that Landlord had some role in the denial of NY27's application for a liquor license. Tenant claims that Landlord's badmouthing of Montwaid made CB4 not want to let him run a nightclub. Tenant submits no evidences of this alleged defamation other than its own conclusory allegations. Moreover, as CB4's letter makes clear, the reason for the denial was not the desirability (or lack thereof) of Montwaid as a club owner. Hence, even if Landlord did defame Montwaid, Tenant suffered no resulting damages because it is clear that the neighborhood was not going to allow any more nightclubs, no matter who ran them. Of course, Tenant's own problems with its clubs and its multiple NYPD shutdowns likely made an impact on CB4's decision and the community's feelings.

⁵ See also Dkt. 171 at 6 (stipulation, dated September 7, 2012, setting forth procedural history in the bankruptcy case, in which Tenant agreed "that it will not commence any adversary proceedings or contested matters against Landlord or Neil Schwartz (i) challenging, or otherwise seeking to avoid, its obligation to timely pay future post-petition rent owed under the Lease ... or (ii) seek[] to stay the Landlord's right to [evict Tenant if Tenant] fails to pay the full rent ... owed under the Lease for any month thereafter").

⁶ In a call with the court on July 30, 2014, the parties confirmed that Tenant surrendered

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Tenant moves for summary judgment on its claim that it does not have to pay rent because Landlord's refusal to consent to the proposed 27NY sublease was supposedly unreasonable. Additionally, Tenant claims that Landlord interfered with the CB4 application process by making false statements about Tenant and Montwaid. Tenant has no evidence

possession in 2013 and that the Property has since been sold.

supporting these allegations. Tenant, instead, relies on testimony from an unfinished use and occupancy hearing before the prior Justice (which was vacated upon the prior Justice's recusal and which this court ruled it would not consider) and its own self-serving statements about Landlord's actions. Tenant produced nothing to substantiate the allegation that, regardless of Landlord's desire to rid itself of Tenant for serial non-payment of rent, Landlord actually interfered with and was the reason CB4 rejected 27NY's liquor license application. In other words, Tenant has not set forth a *prima facie* case on its claims. *See Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 (2014) (If moving party fails to meet *prima facie* burden, summary judgment must be denied "regardless of the sufficiency of the opposing papers").

In any event, Landlord's evidence conclusively establishes that Tenant's claims are baseless. CB4 explicitly set forth its reasons for denying 27NY's liquor license application, and none of them have anything to do with Landlord. Tenant does not argue nor is there any reason to think that CB4's stated reasons were untruthful. Landlord, therefore, has proven that it was not the reason that 27NY did not execute a sublease. Tenant's claims against Landlord – no matter if they are framed in tort or contract – fail as a result.

Turning now to Landlord's non-payment claim, summary judgment is clearly warranted on liability since the dismissal of Tenant's claims leaves Tenant without any possible set-offs. As to damages, Landlord submits its calculation of the total amount owed by Tenant: \$2,716,854.74. Though Tenant makes conclusory objections to Landlord's calculations, Tenant submits no evidence that Landlord's calculations are incorrect or that Landlord failed to properly account for all of Tenant's payments. Summary judgment, therefore, is granted to Landlord.⁷

⁷ As a result, the court will not reach Tenant's "law of the case" arguments regarding use and

Finally, though Tenant's defamation claim is dismissed, the court grants Landlord's motion to amend its answer. The Landlord, in its answer, inadvertently failed to include the denial of certain boilerplate paragraphs pertaining to Tenant's defamation claim. In reviewing the record and the scope of the parties' discovery, it is clear that this oversight did not prejudice Tenant. *See McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) ("Prejudice to warrant denial of leave to amend requires some indication that the defendant has been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position") (citation and quotation marks omitted). Indeed, it does not appear that Tenant noticed this oversight until Landlord recently brought it to the court's attention. Regardless, this issue is academic since the defamation claim, like all of Tenant's claims, lacks merit. While the demise of Tenant's nightclub business is unfortunate, such demise was due to the NYPD shutdowns, the loss of its liquor license, and Tenant's bankruptcy. These events were not caused by Landlord, nor is there any evidence that Landlord was responsible for the denial of 27NY's liquor license application.⁸ Accordingly, it is

ORDERED that the motions are decided as follows: (1) summary judgment is granted to Landlord on its claim for unpaid rent in the amount of \$2,716,854.74; (2) Tenant's motion for

occupancy. It should be noted that, as Landlord correctly explains in its brief (Dkt. 253), Tenant's interpretations of the Appellate Division's decision and the bankruptcy court stipulations border on the frivolous. Simply put, the appeal of this court's use and occupancy ruling was rendered moot by virtue of the bankruptcy court proceedings, not the merits of the use and occupancy claim itself. In any event, as Landlord is being awarded all of its rent, the use and occupancy dispute is, at this point, certainly moot.

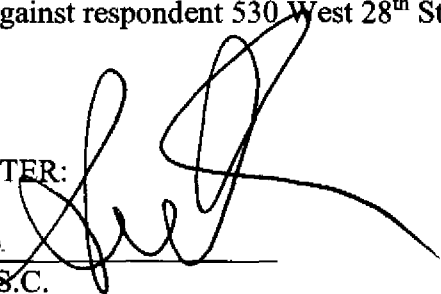
⁸ Evidence that the Landlord had communications with individuals in attendance at the CB4 meeting does not prove causation. In any event, as CB4's letter makes clear, the community's desire to rid itself of nightclubs, and not Montwaïd's credentials, was the reason 27NY's liquor license application was denied.

partial summary judgment is denied; (3) Landlord's motion to amend its answer is granted, such amended answer shall be e-filed within 3 days of the entry of this order of the NYSCEF system, and Tenant shall be deemed to have been served *nunc pro tunc* as of February 4, 2011; and (4) all of the parties' remaining claims are dismissed with prejudice; and its if further

ORDERED that the Clerk is directed to enter judgment under Index No. 651709/2010 dismissing the Amended Complaint with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment under L&T Index No. 68861/2011 in favor of petitioner RN Realty LLC and against respondent 530 West 28th Street, L.P. in the amount of \$2,716,854.74.

Dated: August 1, 2014

ENTER: 

J.S.C.