

Abramson v 74th LLC
2014 NY Slip Op 33005(U)
November 25, 2014
Sup Ct, NY County
Docket Number: 151330/2014
Judge: Manuel J. Mendez
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PRESENT: MANUEL J. MENDEZ
Justice

PART 13

DAVID L. ABRAMSON, M.D. and SCOT BRADLEY GLASBERG, M.D.,
Plaintiffs,
-against-

INDEX NO. 151330/2014
MOTION DATE 11/12/2014
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

74th LLC and BEN HELLER,
Defendants,

The following papers, numbered 1 to 9 were read on this Order to Show Cause for a declaratory judgment.

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1-4	_____
5-7	_____
8-9	_____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion for summary judgment as to the first cause of action asserted in the Complaint for a declaratory judgment is denied.

David L. Abramson, M.D. and Scot Bradley Glasberg, M.D. (herein "Tenants") operate a medical practice in a commercial space located at 42 West 74th Street, New York, New York (herein "Property"). Tenants leased the commercial space from Ben Heller, and 74th LLC as Heller's successor-in-interest (here "Landlord"). The parties entered into a lease agreement dated November 18, 1999 (herein "Lease"). The Lease commenced on April 10, 2000 and terminated in March 31, 2010, but gave Tenant the option to extend the term of the Lease for one (1) five-year term. The Lease sets the amount for base rent and accompanying increments over the term of the Lease. The Lease also requires the Tenants' to pay their proportionate share of the Property's water bill and real property taxes (herein "Additional Rent"). Tenants exercised their option to extend the Lease for one (1) five-year term and the Lease expires on March 31, 2015.

On November 11, 2013, Landlord served Tenants with a Notice of statement of Outstanding Additional Charges, and advised Tenants of its intention to sell the Property (see Aff. in Supp., Exhibit C). The Offer Notice stated that "the Lease requires me to give you notice if I wish to sell the building. This is to advise [you] that I have just given [the listing] to sell the [Property] at a sale price of \$17,600,000. Should [Tenants] desire to buy the [Property] and have the financial capacity to do so, please advise" (see Aff. in Supp., Exhibit D).

Tenants replied by alleging that Landlord made changes to the Property's heating system thereby causing Tenants' treating rooms to become "virtual ovens." As a result, several patients allegedly passed out in Tenants' treating rooms (see Aff. in Supp., Exhibit B). In a letter dated November 27, 2013, Landlord replied by requesting the parties meet with their attorneys to speak about the heating issue and to discuss the Offer Notice to sell the Property (see Aff. in Supp., Exhibit C). Landlord also annexed a subsequent Offer Notice to the November 27, 2013 letter.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Tenants did not exercise their option to purchase the Property. Landlord began negotiations with a third-party purchaser. While the Landlord negotiated the sale of the Property, Tenants informed Landlord that the amount allegedly owed in Additional Rent was incorrect. On January 22, 2014, Landlord served Tenants with a Notice to Cure the default in payment of Additional Rent (see Aff. in Supp., Exhibit E), and informed the third-party buyer that it was in the process of "attempting to remove the [Tenants] currently occupying the first floor ... pursuant to the [Lease]" (see Aff. in Supp., Exhibit F).

On February 4, 2014, Landlord served Tenants with a Notice of Termination of Lease and Acceleration of Rent (herein "February Termination"). The February Termination advised Tenants that Landlord would be terminating the Lease as of February 12, 2014 pursuant to the Lease for Tenants' failure to cure the Additional Rent deficiency. Tenants then commenced the instant action on February 13, 2014. Prior to commencement of this action Tenants made a payment in the amount of \$13,250.00 for excess taxes for 2013 (see Complaint, Exhibit G). After commencing the instant action, Landlord served Tenants with a letter dated March 5, 2014 admitting the error in the amount owed for Additional Rent, withdrawing the January 22, 2014 Notice to Cure and the February Termination, and annexing a Notice of Termination of Lease (herein "Termination Notice"). Pursuant to Section 61(c) of the Lease, the Termination Notice gave Tenants notice that Landlord intended to terminate the Lease as of September 10, 2014. After the Landlord ended negotiations with the third-party buyer, Landlord sent Tenants a letter dated March 26, 2014, in which Landlord withdrew the Termination Notice.

The Complaint asserts causes of action for a declaratory judgment, breach of lease, and breach of covenant of good faith and fair dealing. Tenants now move by Order to Show Cause for summary judgment as to the first cause of action seeking a declaratory judgment that notices provided by Landlord are legally defective, null, and void, that the Termination Notice is in full effect, that the March 26, 2014 withdrawal of the Termination Notice is null and void, and that Tenants are not in default of their obligations under the Lease.

In opposition, Landlord contends that summary judgment is premature as there is outstanding discovery. Landlord further contends that Section 61(c) of the Lease is silent as to whether a termination notice may be revoked prior to the effective termination date.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

Section 61(b) of the Lease states, in part, that in the event that Landlord desires to sell the Property, "prior to offering the [Property] for sale to any third party, [Landlord] shall deliver written notice to Tenant[s] of its proposed sale of the [Property]. Which notice shall include the price and other material terms and conditions on which [Landlord] wishes to sell the [Property]" (see Aff. in Supp., Exhibit A, Pg. 23). Tenants are required to respond to said written notice within 30 days of receipt. Tenants' failure to respond to said notice within 30 days of receipt is an irrevocable waiver (*Id.*).

The November 27, 2013 Offer Notice states that the Landlord seeks to sell the Property for \$17,600,000, all cash, in the Property's existing physical condition. If the Tenants elected to purchase the property, the Offer Notice requires that the terms set forth in Section 61(b) of the Lease be strictly adhered to and that time is of the essence. The Offer Notice dated November 27, 2013 sets forth the price and material terms and conditions as required by Section 61(b).

Section 61(c) states that:

In the event that at any time during the term, [Landlord] shall propose to sell the building to a third party, (subject to [Tenants'] right to purchase the [Property] from the names [Landlord] as provided in the preceding Paragraph), [Landlord] shall have the right to terminate this Lease effective as of the date that occurs six (6) months following written notice to Tenant (the "Termination Date"). If [Landlord] elects to terminate this Lease as aforesaid, [Landlord] shall pay Tenant a termination payment equal to nine (9) times the monthly Base Rent payable during the Lease Year in which the Termination Date shall occur. Such termination payment shall be payable by bank check or certified check on the date that Tenant shall vacate the Premises in accordance with Article 22 hereof. On the Termination Date, the Term shall expire in the manner and with the same force and effect as if it were the date set for the expiration of this Lease, and without limiting the generality of the foregoing, if Tenant shall fail to timely vacate the Premises on the Termination Date and otherwise comply with its obligations with respect to the surrender of the Premises, [Landlord] shall retain all of its legal and equitable remedies with respect to [Tenants'] failure to perform its obligations hereunder, including, without limitation, those set forth in Article 50 thereof.

Section 61(c) allows the Landlord the right to terminate the Lease, but only upon providing Tenants with written notice. Further, the Termination Date of the Lease must be at least six (6) months after Tenants received written notice of termination. After the expiration of the required six months notice, and upon termination of the Lease, Tenants are entitled to the termination payment in the amount of nine (9) times the monthly Base Rent, at the time Tenants vacate premises.

Here, Landlord served the Termination Notice on March 5, 2014 thereby setting September 10, 2014 as the Termination Date. Tenants did not vacate the Property prior to the September 10, 2014 Termination Date. The Lease was in effect at the time Landlord withdrew his Termination Notice on March 26, 2014. Nothing in the Lease prohibits Landlord from withdrawing the Termination Notice prior to the termination date set forth in the Termination Notice. Further, the nine (9) month termination payment is only triggered after Landlord provides the Termination Notice and six (6) months have elapsed since the Termination Notice was served, and Landlord is required to pay the termination payment on the date Tenants vacate the Property.

Tenants fail to make a prima facie showing of entitlement to judgment as a matter of law. The Termination Notice is null and void, and the March 26, 2014 withdrawal of the Termination Notice is valid and remains in full force and effect. Tenants are not entitled to the nine (9) month termination payment under Section 61(c) of the Lease pursuant to the March 5, 2014 Termination Notice.

Summary judgment declaring Tenants are not in default of their obligations under the Lease is moot as Landlord withdrew the January 22, 2014 Notice to Cure and the February 4, 2014 Termination (see *Eve & Mike Pharmacy, Inc. v. Greenwich Pooh, LLC*, 107 A.D.3d 505, 968 N.Y.S.2d 22 [1st Dept., 2013]).

Accordingly, it is ORDERED that this motion for summary judgment by Order to Show Cause as to the First Cause of action asserted in the Complaint is denied, and it is further,

ORDERED, that the parties appear for a Status Conference on January 21, 2014 in IAS Part 13 located at 71 Thomas St., Room 210, New York, New York at 9:30AM.

Enter: **MANUEL J. MENDEZ**
J.S.C.

Dated: November 25, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE