Jack Kelly Partners LLC v Zegelstein
2014 NY Slip Op 33673(U)
October 15, 2014
Supreme Court, New York County
Docket Number: 600351/08
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

JACK KELLY PARTNERS LLC,
Plaintiffs,

INDEX NO. 600351/08

-against-

MOTION SEQ. NO. 005

ELSA ZEGELSTEIN AND DEBRA ZEGELSTEIN AS EXECUTORS OF THE ESTATE OF JOSEPH ZEGELSTEIN and ELSA ZEGELSTEIN d/b/a J&E REALTY,
Defendants.

The following papers were read on this motion by the defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ Yes ☐ No

In this action Elsa Zegelstein and Debra Zegelstein as Executors of the Estate of Joseph Zegelstein and Elsa Zegelstein d/b/a J&E Realty (collectively, defendants) move, pursuant to CPLR 3212, to dismiss Jack Kelly Partner LLC's (plaintiff) amended complaint and for an Order granting the relief set forth in defendants' counterclaim s. Also before the Court is a cross-motion by plaintiff, pursuant to CPLR 3212, for summary judgment on its complaint and for attorney's fees and costs associated with bringing the cross-motion. Furthermore, plaintiff requests that the defendants' motion for summary judgment be denied.

BACKGROUND

The facts of this action were fully detailed in prior decisions of the Court and familiarity with them is presumed. In its amended complaint and pleading papers plaintiff requests that the Court issue an Order holding that the lease is illegal and unenforceable *ab initio*, plaintiff is not liable for rent under the lease agreement, is entitled to the full value of its security deposit plus interest, and damages incurred because of plaintiff's hasty relocation of its business, lost profits and lost business opportunities. By Decision and Order of J. Stallman, dated November 30, 2009 (the 2009 Order), the Court granted in part defendants' motion to dismiss plaintiff's amended complaint pursuant to CPLR 3211(a)(1) and (7) to the extent that plaintiff's cause of action for breach of contract, and the claims in the other causes of action asserted which sound in or are predicated on fraud, misrepresentation or mistake were dismissed. The Court also dismissed the claims in plaintiff's amended complaint predicated on money damages, which flow from the aforementioned dismissed causes of action, including damages sought for moving expenses, loss of business, interruption of business, loss of goodwill, damage to reputation and reimbursement of rent already paid.

As to plaintiff's first cause of action for rescission, the Court ruled in the 2009 Order that plaintiff could not claim rescission of the lease based upon mutual or unilateral mistake, however denied plaintiff's motion to dismiss on rescission based on impossibility. Furthermore, the Court denied plaintiff's motion for declaratory judgment on the grounds that a justiciable controversy lies as to the continued validity or enforceability of the lease. However, the Court expressed its view that paragraph 57(C) of the lease does not preclude plaintiff from raising failure of consideration as a basis for opposing the prospective enforcement of the lease after plaintiff vacated the leased premises. Next, the Court dismissed plaintiff's third cause of action for breach of contract and fourth cause of action for breach of the covenant of good faith and fair dealing, which was included in the breach of contract claim. Lastly, the Court dismissed

plaintiff's fifth cause of action for violation of General Business Law § 349.

In their motion for summary judgment, defendants assert counterclaims as to the first cause of action for rescission based upon fraud and misrepresentation and second cause of action for declaratory judgment, and for breach of the lease agreement. In reply, plaintiff cross-moves for summary judgment on the grounds that the lease is illegal and unenforceable and as such should be rescinded, or alternatively, plaintiff's summary judgment motion should be granted based on both impossibility of performance and failure of consideration. In addition, plaintiff avers that defendants' counterclaim for breach of contract must be dismissed, as the lease was void and illegal *ab initio.*

Defendants assert counterclaims in their answer for the tort of inducing breach of contract and breach of the implied covenant of good faith and fair dealing, as well as damages resulting therefrom.

STANDARDS OF LAW

I. Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

Once a prima facie showing has been made, however, "the burden shifts to the

nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

II. Declaratory Judgment

CPLR 3001 provides that:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds[.]

Pursuant to CPLR 3001, the supreme court may exercise its discretion to "render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy'" (*Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]). Nevertheless, only a real dispute between parties involving substantial legal interests for which a declaration of rights will "serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" can constitute a justiciable controversy

(*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; *see generally Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]). Furthermore, in a motion under CPLR 3001, plaintiff may join the declaratory judgment relief with claims for additional relief for which plaintiff deems itself entitled.

DISCUSSION

Plaintiff, in its cross-motion, seeks an order granting summary judgment in its favor on the basis that the lease is illegal and unenforceable, that defendants' efforts to hold plaintiff accountable for rent under the lease are unlawful, that plaintiff shall recover from defendants the full value of its security deposit plus interest, as well as all damages incurred by plaintiff by reason of having to relocate its business quickly, for lost profits and lost business opportunities. However, the Court in its 2009 Order dismissed the claims in plaintiff's amended complaint that seek money damages. The 2009 Order specifically discussed the dismissed claims, which included *inter alia*, moving expenses, loss of business and interruption of business. As such, the portion of plaintiff's cross-motion that seeks money damages from defendants is denied on the doctrine of law of the case (*see Carbon Capital Management, LLC v American Exp. Co.*, 88 AD3d 933, 935 [2d Dept 2011], quoting *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975] ["The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"]).

In its amended complaint, plaintiff argues that the lease entered into between plaintiff and defendants was void, or voidable, and subject to rescission for public policy reasons, and because its provisions could not be enforced as the conduct and intent of the lease violated the relevant rules and regulation of the New York City Building Code. Plaintiff further alleges that defendants either knowingly or mistakenly caused plaintiff to enter into the lease and that plaintiff did not receive the full benefit entitled to it under the terms of the lease and based upon

the rental value paid to defendants. In fact, plaintiff contends that the instant action was necessitated by defendants' failure to undertake any efforts to revise or correct said certificate in order to lawfully allow the agreed upon commercial use of the premises. Plaintiff argues that since the lease required illegal use and illegal occupancy of the demised premises by plaintiff, the lease should be declared illegal and unenforceable. Furthermore, plaintiff submits that its decision to vacate the demised premises was justified by defendants' insistence that plaintiff was to be held accountable under the lease because defendants had the obligation to correct or amend the certificate of occupancy. Plaintiff argues that alternatively it is entitled to rescission of the lease on the basis of both impossibility of performance and failure of consideration. Indeed, this Court stated in the 2009 Order, that in the Court's view, paragraph 57(C) of the lease does not preclude plaintiff from raising failure of consideration as a basis for opposing the prospective enforcement of the lease, i.e. after it vacated occupancy (Sava Affirm., exhibit J, at page 6).

1. *Plaintiff's Application for Declaratory Judgment as to Validity and Enforceability of the Lease*

A. *Failure of Consideration*

It is well settled that a mere lack of certificate of occupancy for the use contemplated by a lease agreement does not absolve a tenant from its obligation to pay rent and justify abandonment of the demised premises, nor does the lack of conforming certificate of occupancy alone cause the lease to be void for illegality or result in a failure of consideration (see *56-70 58th St. Holding Corp. v Fedders-Quigan Corp.*, 5 NY2d 557 [1959]; *Jordache Enters. v Gettinger Assoc.*, 176 AD2d 616 [1st Dept 1991]; *see also Silver v Moe's Pizza*, 121 AD2d 376 [2d Dept 1986]; *Cutler-Hammer, Inc. v One Lincoln Assoc.*, 79 AD2d 512 [1st Dept 1980]; *Shawkat v Malak*, 38 Misc 3d 52, 54 [NY App Term 2013]). The cases are also legion in which the courts held that even if the certificate of occupancy and zoning regulations preclude

the tenant from using the premises for the purpose specified in the lease, this does not absolve the tenant of its obligation to pay rent for the period of time when the tenant has occupied the premises, including where the landlord made no representation concerning the certificate of occupancy for the intended use under the lease (*see e.g. Phillips & Huyler Assoc. v Flynn*, 225 AD2d 475 [1st Dept 1996]; *Only Props., LLC v Cavlak*, 30 Misc 3d 129[A], 2010 NY Slip Op 52300[U] [NY Sup App Term 2010]; *All Metro Corp. v Fit Laundromat*, 13 Misc 3d 131[A], 2006 NY Slip Op 51858[U] [NY Sup Ct App Term 2006]). Therefore, the Court finds that plaintiff's argument that the lease is illegal for want of a conforming certificate of occupancy must fail. Plaintiff's argument regarding the failure of consideration is also unavailing for the reasons stated below.

Plaintiff asserts that there exists no support in the documentary evidence submitted which placed on plaintiff the obligation to take affirmative steps to revise or alter the certificate of occupancy. In response, defendants point out to paragraph 57(D) of the lease and the 2009 Order. In the 2009 Order, the Court already determined[1] that paragraph 57(D)[2] places the responsibility on plaintiff to seek a change of the certificate of occupancy for the demised premises, which is part of the certificate of occupancy for the entire building (Sava Affirm.,

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[1] The 2009 Order states in the relevant part that:

> "While the parties' lease places on plaintiff the responsibility to seek any governmental permit or license needed to conduct its business, the Court Notes that an owner's active participation would be required were any application to be made to the City to change the C of O so as to conform it to the commercial use. It is not at all clear, and cannot be determined on this motion, what if any attempts were made by plaintiff to seek a C of O change, including seeking defendant's assistance, and what if anything defendant did or did not do to cooperate with plaintiff so a as to obtain or facilitate a changed C of O. To the extent that plaintiff seeks an equitable remedy, there [sic] issues become significant (Sava Affirm., exhibit J, at page 5).

[2] Paragraph 57(D) states in the relevant part:

> If any governmental license or permit (other than a certificate of occupancy for the entire Building), shall be required for the proper and lawful conduct of Tenant's business in the Demised Premises or any part hereof, Tenant, at is expense, shall duly procure and thereafter maintain such license or permit and submit the same to Landlord for inspection. Tenant shall at all time comply with the terms and conditions of each such license or permit (Sava Affirm., exhibit R, at page 12 of 21).

exhibit J).

Notwithstanding the foregoing, plaintiff avers that nowhere in the lease is an affirmative obligation placed on plaintiff to procure a certificate of occupancy. Plaintiff argues further that to the extent that any ambiguity as to the meaning of the lease provisions can be found, such ambiguity must be resolved against the landlord, who drafted the lease. These arguments are defeated by the plain language of paragraph 65 of the lease agreement, which provides that "[the] Lease shall be deemed to have been jointly prepared by both the Landlord and Tenant and any ambiguities or uncertainties herein shall not be construed for or against either of them" (Sava Affirm., exhibit R, at page 18 of 21) (*see also Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 66 [2006] [a commercial lease should be enforced according to its terms when parties set down their agreement in a clear, complete document and extrinsic and parol evidence is not admissible to create an ambiguity]; *Farrell Lines v City of New York*, 30 NY2d 76, 165 [1972] ["(a)n agreement of lease possesses no peculiar sanctity requiring the application of rules of construction different from those applicable to an ordinary contract"] [internal quotes omitted]).

Furthermore, defendants made no covenant in the lease agreement to procure a conforming certificate of occupancy, or obtain a zoning variance, and plaintiff enjoyed undisturbed right to possession of the demised premises (*see Silver*, 121 AD2d at 377-378, citing *56-70 58th St. Holding Corp. v Fedders-Quigan Corp.*, 5 NY2d 557 [1959]; *cf.* Multiple Dwelling Law § 302[1][b]; *Kosher Konvenience, Inc. v Ferguson Realty Corp.*, 171 AD2d 650 [2d Dept 1991]). Moreover, the terms of the lease do not condition plaintiff's promise to pay the rent on either explicit or implied covenant that defendants have a proper certificate of occupancy for the demised premises (*see Raner v Godberg*, 244 NY 438 [1927]). In the 2009 Order, this Court held that the lease clearly delivered the premises in "as is" condition and paragraph 57(C) of the lease, should have placed plaintiff on notice to check the certificate of

occupancy, and applicable laws, codes, and zoning regulations (Sava Affirm., exhibit J, at page 3).

Paragraph 57(C) provides that:

> Landlord makes no representations that the use to be made of the Demised Premises, as specified herein, is consistent with permitted uses under the existing certificate of occupancy issue[d] for the Building. In the event that such use is inconsistent with said certificate of occupancy and further, that the Department of Buildings or other governmental agency having jurisdiction, issues a violation based on such inconsistent use, this Lease, shall be terminable by Landlord in accordance with the provisions for notice set forth herein, on thirty (30) days' prior written notice to Tenant (Sava Affirm., exhibit R, at page 12 of 21).

As defendants correctly contend, paragraph 57(C) of the lease contains disclaimer of warranty that the contracted for use of the premises, as strictly specified in the lease, is consistent with the permitted uses under the existing certificate of occupancy for the demised premises (*see* Sava Affirm., exhibit R, at page 12 of 21). Based on this language of the lease, defendants argue, that plaintiff's claim of fraud and misrepresentation is deficient and cannot sustain the cause of action for rescission. Once again, in the 2009 Order, this Court found that the documentary evidence conclusively established a defense, as a matter of law, to plaintiff's claim that the landlord breached an alleged promise that the premises may be legally used and occupied as a commercial space, and to plaintiff's claim that defendants falsely represented that the premises could be used for commercial purpose (Sava Affirm., exhibit R, at page 3). "Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations" (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1951]).

B. *Impossibility of Performance*

In the 2009 Order, the Court held that it could not determine under the circumstances of the case whether when viewing the allegations in a light most favorable to it, plaintiff is entitled

to state or prove a cause of action for rescission based on impossibility of performance (Sava Affirm., exhibit J, at page 5). In furtherance of its argument for rescission of the lease *ab initio* on the basis of the doctrine of impossibility of performance, plaintiff submits that it cannot perform under the terms of the lease that allows solely commercial use while the current certificate of occupancy restricts the use of the demised premises to residential purposes. "Generally, once a party to a contract has made a promise, that party must perform or respond in damages for its failure" (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]). However, "[i]mpossibility excuses a party's performance only when the destruction of the subject matter of the contract is objectively impossible" and as such "produced by an unanticipated event that could not have been foreseen or guarded against in the contract" (*id.*). The defense of impossibility is usually "limited to the destruction of the means of performance by an act of God, *vis major*, or by law'" (*Kolodin v Valenti*, 115 AD3d 197, 589 [1st Dept 2014] [internal quotations omitted]). In the present posture of the facts and documentary evidence presented, the Court finds that plaintiff could have foreseen and contractually guarded against the issue of the lack of conforming certificate of occupancy for the demised premises. As this Court stated in the 2009 Order, plaintiff's erroneous assumption as to the certificate of occupancy could have been timely corrected had it used due diligence, because the certificate of occupancy is a readily accessible public document (Sava Affirm., exhibit J, at page 4). In addition, the Court indicated that paragraph 57(C) of the lease, should have placed plaintiff on notice to check the certificate of occupancy (*id.*). What is more, the terms of the certificate, as a public record, were not within the exclusive knowledge of defendants to justify plaintiff's lack of due diligent efforts (*see Jordache Enters. v Gettinger Assoc.*, 176 AD2d 616 at 617).

2. *Defendants' Counterclaims*

Although defendants interposed six counterclaims in their Verified Answer, the parties

stipulated to defendants' withdrawal of counterclaims three through six. Thus, the Court need only consider defendants' first and second counterclaims.

The first counterclaim is for breach of contract and seeks damages for the alleged breach of the lease agreement. Based on the foregoing, the Court has already established that the lease is valid and enforceable, and the plaintiff breached the lease agreement by its decision to vacate the demised premises and withhold the rent payments under the lease for the remainder of the term of the lease. Therefore, defendant's claim for breach of contract must stand.

The second counterclaim is styled as a breach of the covenant of good faith and fair dealing by plaintiff. Despite defendant's attempt to characterize the claim as tort of inducing breach of contract, the claim is duplicative of the counterclaim for breach of contract (Skillgames, LLC v Brody, 1 AD3d 247 [1st Dept 2003]). As such, this counterclaim asserted by the defendants is dismissed.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

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

DECLARED, that the lease agreement is valid and enforceable, and plaintiff is bound by its obligations under its terms; and it is further,

ORDERED that the portion of defendants' motion to dismiss plaintiff's amended complaint, is granted, and the plaintiffs' amended complaint is hereby dismissed in its entirety, with prejudice; and it is further,

ORDERED that the portion of defendants' motion which seeks summary judgment on its counterclaims is granted as to defendants' first counterclaim for breach of contract but is otherwise denied as to the counterclaim for inducing breach of contract and the covenant of

good faith and fair dealing which is hereby dismissed; and it is further,

ORDERED that counsel for defendants is directed to file the Note of Issue on or before November 21, 2014, and upon that filing the Clerk shall set a date upon which an inquest will be held assessing damages against plaintiff on defendants' counterclaim; and it is further,

ORDERED that defendants shall serve a copy of this Order with Notice of Entry upon all parties, upon the Clerk of the Court who is directed to enter judgment accordingly, and upon the Clerk of the General Clerk's Office who shall set this matter down for a hearing on damages.

This constitutes the Decision and Order of the Court.

Dated: 10-15-14 **Enter:**

PAUL WOOTEN, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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