Passaic Indus. Ctr. Assoc. v MWT Materials Inc.

2015 NY Slip Op 30069(U)

January 9, 2015

Supreme Court, New York County

Docket Number: 156048/13

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 59

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PASSAIC INDUSTRIAL CENTER ASSOCIATES,

Plaintiff,

-vs-

Index No.: 156048/13

MWT MATERIALS INC. and MICHAEL KATZ,

Defendants.

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DEBRA A. JAMES, J.:

In this commercial landlord/tenant action seeking outstanding rent, plaintiff Passaic Industrial Center Associates moves, pursuant to CPLR 3212, for an order granting it summary judgment on the complaint and scheduling a hearing to determine the amount of attorney's fees to which plaintiff is entitled. Defendants MWT Materials Inc. (MWT) and Michael Katz (Katz) cross move, pursuant to CPLR 3025 (b), to amend their answer to add a counterclaim for rent abatement, and for an order, pursuant to CPLR 3212, dismissing the complaint.

BACKGROUND

The following facts are not in dispute. Defendant MWT rented ground-floor space in two buildings in the Passaic Industrial Center, located at 88-90 Dayton Ave., Passaic, New Jersey (the Property), under a lease dated November 12, 2008.

Simultaneously, on November 12, Katz executed a personal and unconditional guaranty to plaintiff to ensure "the full and prompt payment of rent due under the lease payable by [MWT]"[1] The Lease expired on April 30, 2009 and, thereafter, MWT continued to occupy the leased space as a month-to-month tenant under the terms and conditions set forth in the Lease.

On April 30, 2013 (the Closing Date), plaintiff sold the Property to a nonparty. According to the purchase and sale agreement, dated December 12, 2012 ["the Sale Agreement"]), and the first amendment to the purchase and sale agreement (*id.*, exhibit 3 ["the Amended Sale Agreement"]), plaintiff retained the right to collect rent from the lessees that was unpaid on or by the Closing Date.

Plaintiff commenced the instant action seeking unpaid rent, additional rent, and other charges in the amount of $20,090.65,[2] attorney's fees and disbursements against MWT for

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[1] Article 82 (a) of the Lease designates New Jersey law as the law that governs the construction, validity, enforcement and performance of obligations arising under the Lease. Article 82 (b) designates New York federal or state court as forum for actions or proceedings under the Lease. The guaranty is governed by New York Law.

[2] Plaintiff waives its claim for the "CPI Increase amount" ($3,815.56) and "Real Estate Tax" ($42.56). By reason of this waiver, the alleged amount of MWT's unpaid charges is

breach of its obligation to pay rent from November 2012 through April 2013 (the first cause of action). Plaintiff also seeks damages against Katz for breach of the guaranty.

Defendants answered, asserting a first affirmative defense and counterclaim which alleges that the premises were rendered uninhabitable for significant periods in the aftermath of Hurricane Sandy due to the lack of windows and heat and that, as a result, they were constructively evicted from the premises. Defendants pled a second affirmative defense which alleges that plaintiff improperly calculated the unpaid rent using a holdover formula rather than a month-to-month formula.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007]), citing Winegrad v New York Univ., Med. Ctr., 64 NY2d 851, 853 [1985]). Upon proffer of evidence establishing a prima facie case by the movant, "'the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form

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$16,232.44.

sufficient to require a trial of material questions of fact'" (People v Grasso, 50 AD3d 535, 545 [1st Dept 2008], quoting Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

The branch of the cross motion of defendants seeking summary judgment dismissing the complaint on the ground that plaintiff failed to notify the purchaser of the Property of its intention to bring this action for outstanding rent is denied. Putting aside the question of defendants' standing to raise this issue, plaintiff has established that it complied with the notice provision of the Amended Sale Agreement by submitting a copy of an email dated June 26, 2013 sent to the purchaser of the Property, with the subject line, "Notice of Intent to Commence Action (s) for Delinquent Amounts". Attached to that notice is a partially redacted schedule that names MWT as a subject tenant, with arrears of $20,090.65. Since the instant action was commenced on July 2, 2013, plaintiff has made a sufficient showing that it complied with its contractual obligations to provide notice to the purchaser.

The branch of the defendants' cross motion that seeks leave to amend the answer to add a second counterclaim for rent abatement is granted. On a motion for leave to amend a pleading, the movant "need not establish the merit of its proposed new

allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit, which [MWT and Katz] ha[ve] done" (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010] [internal citations omitted]).[3]

New Jersey law permits a tenant, which has not vacated the subject premises, to assert a claim for rent abatement (Berzito v Gambino, 63 NJ 460, 469 [NJ 1973]). The Berzito court held that:

> "the covenant on the part of a tenant to pay rent, and the covenant-whether express or implied-on the part of a landlord to maintain the demised premises in a habitable condition are for all purposes mutually dependent. Accordingly, in an action by a landlord for unpaid rent a tenant may plead, by way of defense and set off, a breach by the landlord of his continuing obligation to maintain an adequate standard of habitability"

(63 NJ at 469).

Although Berzito is an action dealing with residential leases, New Jersey courts have extended Berzito's application to commercial leases. In Westrich v McBride (204 NJ Super 550, 556 [NJ Super 1984]), the court held "that a lease, whether it be for residence or for commercial purposes, is a set of mutually dependent covenants; i.e. the tenant's covenant to pay rent is

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[3] Matters dealing with the conduct of the litigation are procedural for conflict of law purposes and are governed by the law of the forum (*see* Curbow Family LLC v Morgan Stanley Inv. Advisors, 36 Misc 3d 889, 894 [Sup Ct, NY County 2012]).

dependent (among other things) on the landlord's covenant permitting the tenant the quiet enjoyment of the leased premises." In Westrich, the court held that the landlord's failure to provide heat to a commercial tenant substantially interfered with the tenant's use of the property and that such failure relieved the tenant of the obligation to pay full contractual rent (*id.* at 556). There, as here, the tenant alleged that it gave the landlord notice, on several occasions, of the landlord's breach of his obligations under the lease and that the landlord did nothing to remedy the situation. Accordingly, the court applied the principles articulated in Berzito[4] and awarded the commercial tenant a rent abatement.

In this case, defendants' third affirmative defense and second counterclaim allege that the premises were rendered untenantable for significant periods, that there was no heat, the roof leaked and the windows were missing. Defendants allege

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[4] In Berzito (63 NJ at 469), the court stated that as a prerequisite to maintaining the abatement cause of action, the tenant must give the landlord notice of the defect, it must request that it be corrected, and it must give the landlord adequate time to make the repair. The Berzito court also stated that "[n]ot every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. The condition complained of must be such as truly to render the premises uninhabitable in the eyes of a reasonable person" (*id.*).

that because of these conditions they are entitled to an abatement in rent. Moreover, plaintiff has attached an email from defendant Katz to plaintiff's attorney wherein Katz outlines his notice to plaintiff of roof leaks, missing windows and lack of heat; his demand that the repairs be made and his allegation that the heat was not repaired for five months and the windows and roof were not repaired until after the sale of the property. In addition, the lease provides that it is the landlord's obligation to maintain the roof, to replace the windows and to provide heat. Therefore, since the tenant's obligation to pay rent is co-extensive with the landlord's covenant to provide the tenant with premises in a habitable condition, plaintiff's reliance on paragraph 42 (b) of the lease, which states that the tenant will pay the landlord the fixed annual rent without "reduction or set-off," is unavailing because defendants have alleged that the premises were uninhabitable and that the "breach by a landlord had a significant effect on a tenant's use of the premises".

Moreover, plaintiff's reliance on Article 47 (a) of the lease[5] for the proposition that the claim for rent abatement based

[5] Paragraph 47 (a) of the Rider to the lease provides, in pertinent part:

on inconvenience or loss of productivity is barred by the terms of the lease is without merit. Article 47 (a) clearly states that it applies only to a tenant's claim for any loss to a tenant that arises from the landlord performing any maintenance, repairs, alterations, additions or improvements to the premises. In this case, defendants are alleging that they are entitled to a rent abatement because plaintiff failed to make the repairs it was obligated to make pursuant to paragraphs 3 (roof), 31 (heat) and 37 (windows) of the lease -not because the landlord did make those repairs.

In addition, Article 48 of the lease, which requires the tenant to maintain certain insurance policies, does not bar the counterclaim for an abatement because the tenants are not

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"Notwithstanding anything to the contrary contained in this Lease, none of the Landlord parties . . . shall be liable to the tenant . . .for any loss, injury or damage to tenant . . ., or for any inconvenience annoyance, interruption or injury to business arising from (I) Landlord performing any maintenance, repairs, alterations, additions or improvements to any portion of the Building or the demised premises . . . (nor shall Tenant . . . be entitled to any abatement or suspension of its obligation to pay fixed annual rent or any additional rent . . . or be construed to be constructively or otherwise evicted on account of the foregoing), . . . (ii) . . . any injury or damage for which Tenant would have been reimbursed under policies of insurance required to be maintained by the Tenant by the terms of this Lease".

claiming damage to equipment or business interruption. Rather, they are claiming that, under the law of contracts, their obligation to pay rent is co-extensive with plaintiff's covenant to provide defendants with a habitable premises and that plaintiff breached that obligation.

Accordingly, as the defendants' proposed counterclaim for a rent abatement is not palpably insufficient or clearly devoid of merit, and the branch of the cross motion that seeks to amend the answer to add a third affirmative defense and second counterclaim is granted.

Plaintiff's motion for summary judgment is granted to the extent that first affirmative defense and counterclaim and the second affirmative defense of defendants' answer are dismissed.

Plaintiff has made a prima facie showing that the first affirmative defense and counterclaim alleging constructive eviction is without merit because defendants did not surrender possession of, or abandon, the premises (*see* JS Props. L.L.C. v Brown & Filson, Inc., 389 NJ Super 542, 547 [App Div 2006] [constructive eviction claim barred by tenant's continued possession of the premises]; Harel Assoc. v Cooper Healthcare Professional Servs., Inc., 271 NJ Super 405, 408 [App Div 1994] [in order to assert the defense of constructive eviction a

tenant must vacate the premises within a reasonable amount of time after the landlord's breach]).

Defendants have failed to come forward with admissible evidence to demonstrate that there is a questions of fact as to whether MWT was constructively evicted from the premises. Indeed, they have failed to address the constructive eviction counterclaim and appear to have abandoned such claim.

Defendants second affirmative defense alleges that plaintiff incorrectly calculated unpaid rent and additional rent based on a "holdover formula" rather than on MWT's status as a month-to-month tenant. However, Cheryl Woodrow (Woodrow), plaintiff's associate director in charge of day-to-day management of the real estate, avers, in her affidavit, that "at no time did Plaintiff apply a holdover formula for determining MWT's charges, but rather elected to charge MWT at the same rental rates reserved in the lease, rather than the higher holdover rate provided for in Article 67. Defendants have failed to come forward with any evidence to raise a question of fact regarding Woodrow's calculation of the rent and additional rent or the formula she used to calculate the alleged arrears.

Accordingly, it is

ORDERED that plaintiff Passaic Industrial Center Associates'

motion for summary judgment and attorney's fees is granted to the extent that the first affirmative defense and counterclaim and the second affirmative defense are dismissed and the motion is otherwise denied; and it is further

ORDERED that defendants MWT Materials Inc. and Michael Katz's cross motion to amend the answer and for summary judgment dismissing the complaint is granted to the extent that the branch of the motion seeking to amend the answer is granted and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve an amended answer in conformance herewith within 20 days of service of this order with notice of entry; and it is further

ORDERED that plaintiff shall serve a reply to the amended answer within 20 days of service of the amended answer; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 103, 71 Thomas Street, New York, New York on March 17, 2015, 10 AM.

Dated: January 9, 2015 ENTER:

J.S.C.
DEBRA A. JAMES