

RLR Realty Corp. v Duane Reade Inc.

2015 NY Slip Op 31858(U)

October 6, 2015

Supreme Court, New York County

Docket Number: 159509/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

RLR REALTY CORP.,

Plaintiff,
-against-

INDEX NO. 159509/14
MOTION DATE 09-30-15
MOTION SEQ. NO. 001
MOTION CAL. NO.

DUANE READE INC., WALGREEN CO. and
WALGREEN EASTERN CO., INC.,

Defendant.

The following papers, numbered 1 to 8 were read on this motion and cross-motion to/for Summary Judgment:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1-4, 5-7, 8

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendants' motion for summary judgment, is granted and this case is dismissed. Plaintiff's cross-motion for summary judgment on the issue of liability for tortious interference with a contract, is denied.

Plaintiff is the owner of a building containing commercial premises located at 811 Southern Boulevard in Bronx, New York. Defendants Walgreen Co. and Walgreen Eastern Co., Inc. (collectively referred to as "Walgreen") are affiliates of each other, Duane Reade, Inc. ("Duane Reade"), is a subsidiary of Walgreen.

Plaintiff had a lease agreement and a renewal lease with non-party, B & P Pharmacy, Inc. (hereinafter referred to as "B & P"), covering a twenty year period that expired on July 31, 2013. B & P, remained in the premises after July 31, 2013, to negotiate a second lease renewal and continued as a month to month tenant. B & P tendered rent pursuant to the terms of the expired lease for August through November of 2013. Plaintiff alleges that in October of 2013, B & P ended the lease negotiations. On October 29, 2013, plaintiff served a 30 day notice of termination on the defendant, ending the month to month tenancy effective November 30, 2013.

On November 19, 2013, B & P entered into an Asset Purchase Agreement with Duane Reade. Amendment No. 1 to the Asset Purchase Agreement dated November 20, 2013, includes a one year non-compete clause with a penalty of 50% return of the amount paid to B & P. The Affidavit of Andrew Barrett, manager of B & P, states that he contacted the defendants on October 14, 2013. Defendants made an offer to purchase the pharmacy assets after service of the notice of termination.

Plaintiff commenced a summary holdover proceeding in Civil Court, Bronx County on December 17, 2013. The holdover proceeding continued until September

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

24, 2014, when plaintiff and B & P entered into a stipulation of settlement and a comprehensive general release. B & P agreed to vacate the premises, and was only obligated to pay \$10,000.00. Under the terms of the settlement, the Civil Court Judge refused to award use and occupancy for the period of December of 2013 through September 24, 2014. Plaintiff commenced this action on September 29, 2014, asserting causes of action for tortious interference with a contract, tortious interference with a prospective contract, and negligence.

Defendants seek an Order pursuant to CPLR §3212, granting summary judgment dismissing this action. They argue that the elements of tortious interference with a contract cannot be established because by the time the Asset Purchase Agreement and its Amendment No. 1 (hereinafter referred to as "the agreements") was entered into, the lease between plaintiff and B& P had long since expired and there was no existing contract. It is defendants contention that plaintiff terminated lease negotiations and commenced the holdover proceeding, terminating any month to month lease, before the agreements with B & P were signed. Defendants argue that plaintiff fails to establish the claim for tortious interference with a prospective contract because there was no culpable conduct causing a breach of the lease provision. They claim the lease does not require that the space be used as a pharmacy, and includes sales of other items which were sold on the premises. Defendants also argue that there is no basis for the negligence causes of action because they had no foreseeability of liability, or duty to the plaintiff when they entered into the agreements with B & P.

Plaintiff opposes defendants' motion and pursuant to CPLR §3212, cross-moves for summary judgment on the issue of liability for tortious interference with a contract. Plaintiff argues that the month to month tenancy is a continuation of the expired lease and the acceptance of monthly rent payments were sufficient to establish an existing implied contract. Plaintiff claims that B & P continued holding over from December 1, 2013 through September 24, 2014, because of the defendants' non-compete clause, and not to operate a sundry store. It is plaintiff's contention, that the defendants knew about the existing tenancy and absent their interference and non-compete clause, B & P would not have continued to holdover in violation of the implied contract.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, 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, 89 N.Y. 2d 833, 675 N.E. 2d 548, 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, requiring a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Defendants established a prima facie basis to obtain summary judgment on the causes of action for tortious interference with a contract. Plaintiff does not raise triable issues or state a basis to obtain summary judgment on the cross-motion.

The elements of a cause of action for tortious interference with a contractual relation is (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages (White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y. 3d 422, 867 N.E. 2d 381,

835 N.Y.S. 2d 530 [2007] and *Barns & Farms Realty LLC, v. Novelli*, 82 A.D. 3d 689, 917 N.Y.S. 2d 691 [N.Y.A.D. 2nd Dept., 2011]).

Plaintiff fails to raise a triable issue of fact that an implied contract existed and that defendants' intentionally induced B & P to breach or render performance of a lease impossible. Plaintiff has not provided compelling evidence of an implied lease agreement, or an agreement with B & P to extend the lease.

Pursuant to RPL §232-c, a month to month tenancy was created at the expiration of the lease renewal upon the continued acceptance of rent by the plaintiff (*Zobe, L.L.C. v. United Norther Bancshares, Ltd.*, 251 A.D. 2d 237, 673 N.Y.S. 2d 314 [1st Dept., 1998]). Absent compelling evidence, a month to month tenancy does not result in an implied agreement to extend the lease (*Joyous Holdings, Inc. v. Volkswagen of Oneonta, Inc.* 128 A.D. 2d 1002, 513 N.Y.S. 2d 841 [3rd Dept., 1987]). A 30 day notice to terminate will result in termination of a month to month tenancy, at the end of the thirty day period (*JPMorgan Chase Bank, N.A. v. Rocar Realty Northeast, Inc.*, 47 A.D. 3d 425, 850 N.Y.S. 2d 30 [1st Dept., 2008]).

The month to month tenancy with B & P remained in effect during the holdover period, but the notice of termination served by plaintiff on October 29, 2013, terminated the tenancy effective November 30, 2013, only 10 days after the agreements between B & P and the defendants were entered into. Plaintiff did not extend the tenancy, he commenced a holdover proceeding on December 17, 2013 and returned B & P's tender of rent for December of 2013. Plaintiff's speculative assertion that the non-compete agreement was part of an intentional inducement to have B & P not comply with a lease agreement after the notice to terminate was served fails to raise issues of fact.

A cause of action for tortious interference with prospective contract rights requires the plaintiff to allege specific facts in support of the claim that, "...the defendant directly interfered with a third-party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff" (*Posner v. Lewis*, 80 A.D. 3d 308, 912 N.Y.S. 2d 53 [1st Dept., 2010]). The plaintiff is required to establish culpable conduct on the part of the defendant, mere persuasion is not enough where the defendant's motivation for the alleged interference is legitimate economic self-interest (*Carvel Corp. v. Noonan*, 3 N.Y. 3d 182, 818 N.E. 2d 1100, 785 N.Y.S. 2d 359 [2004]).

Plaintiff has not raised issues of fact in opposition to defendants' motion for summary judgment on the causes of action for tortious interference with prospective contract rights. He relies on conclusory and speculative assertions of the defendants' culpable conduct in the use of the non-compete provision of the agreements with B & P.

Plaintiff fails to raise an issue of fact on the negligence causes of action. His argument that they apply because it was foreseeable that the agreements would encourage B & P to holdover, causing harm to him as the property owner is conclusory and relies on speculation. Plaintiff has not established that defendants encouraged B & P to holdover or that their actions were foreseeable.

Accordingly, it is ORDERED that the defendants' motion for summary judgment, is granted, and this case is dismissed and, it is further,

ORDERED, that the plaintiff's cross-motion for summary judgment on the issue of liability for tortious interference with a contract, is denied, and it is further,

ORDERED, that the Clerk shall enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ,
J.S.C.

Dated: October 6, 2015

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE