

ESRT 250 W. 57th St., L.L.C. v 13D/W. 57th LLC

2016 NY Slip Op 30353(U)

March 4, 2016

Supreme Court, New York County

Docket Number: 158006/2015

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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ESRT 250 WEST 57TH ST., L.L.C.,

Plaintiff,

Index No. 158006/2015

-against-

DECISION/ORDER

13D/WEST 57TH LLC and KENNETH SQUIRE,

Defendants.

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13D/WEST 57TH LLC,

Counterclaim-Plaintiff,

-against-

ESRT 250 WEST 57TH ST., L.L.C.,
FISK BUILDING ASSOCIATES L.L.C.,
and EMPIRE STATE REALTY TRUST, INC.,

Counterclaim-Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff/counterclaim-defendant ESRT 250 West 57th St., L.L.C. (“ESRT”) commenced the instant action against defendant/counterclaim-plaintiff 13D/West 57th LLC (“13D”) and defendant Kenneth Squire (“Squire”) to recover unpaid rent and damages pursuant to a commercial lease agreement (the “lease”) and a written guaranty of the lease by Squire. Counterclaim-defendants ESRT, Fisk Building Associates L.L.C. (“Fisk”) and Empire State

Realty Trust, Inc. (“Empire”) (“counterclaim-defendants”) now move for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the counterclaims asserted by defendant/counterclaim-plaintiff 13D and the affirmative defenses raised by defendant/counterclaim-plaintiff 13D and defendant Squire.

13D asserts counterclaims for breach of the covenant of quiet enjoyment, constructive eviction, fraudulent inducement and private nuisance. 13D and Squire raise as affirmative defenses (1) that the complaint fails to state a claim upon which relief can be granted, (2) that the complaint is barred because ESRT lacks standing and has failed to name a necessary party, (3) that the complaint is barred by the doctrines of waiver, estoppel, laches, acquiescence, mistake, consent, unclean hands, unconscionability, accord and satisfaction and ratification, (4) that the complaint is barred by ESRT’s breaches of the lease and (5) that the complaint is barred by ESRT’s fraud and bad faith.

The facts asserted in the Answer in support of the counterclaims and affirmative defenses are as follows. Empire has “indirectly” owned, operated and managed the building located at 250 West 57th Street, New York, New York (the “building”) at all relevant times. On or about May 14, 2013, Fisk, which is owned and controlled by Empire, leased a suite in the building (the “premises”) to 13D. ESRT alleges that Fisk assigned its interest in the lease to ESRT. 13D is affiliated with the separate company Investor Communications Network, LLC (“Investor Communications”). 13D leased the premises for Investor Communications to use as general and executive office space. It is undisputed that Investor Communications did not enter into a lease with Fisk or ESRT. The only injury alleged in support of the counterclaims is the inability of Investor Communications to conduct business in the premises due to marijuana use in a neighboring office suite and the resulting odor.

The court first considers counterclaim-defendants' motion to dismiss 13D's counterclaims on the ground that 13D's counterclaims fail to state causes of action because the only injury alleged in support of the counterclaims is to Investor Communications. 13D has failed to state causes of action for breach of the covenant of quiet enjoyment and constructive eviction. To state a claim for "breach of the covenant of quiet enjoyment, a tenant must [allege] either an actual or constructive eviction." See *Grammer v. Turits*, 271 A.D.2d 644, 645 (2nd Dept 2000). "A constructive eviction occurs where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the leased premises." *Id.*

In the present case, 13D has failed to state causes of action for breach of the covenant of quiet enjoyment and constructive eviction as the only harm alleged was to Investor Communications, not 13D. 13D, the undisputed tenant pursuant to the lease, has merely alleged that Investor Communications, not 13D, was deprived of the use of the premises when the marijuana use prevented Investor Communications from conducting its business in the office space. Thus, 13D was not constructively evicted, and cannot state a cause of action for breach of the covenant of quiet enjoyment or constructive eviction.

Further, 13D has failed to state a cause of action for fraudulent inducement. "To state a claim for fraudulent inducement, there must be knowing misrepresentation of [a] material present fact," intended to induce reliance by another party, resulting in injury. *Gosmile, Inc. v. Levine*, 81 A.D.3d 77, 81 (1st Dept 2010). In the present case, 13D has failed to state a cause of action for fraudulent inducement as the only injury that allegedly resulted from the fraudulent inducement was Investor Communications's inability to conduct its business in the office space, not any injury to 13D.

In addition, 13D has failed to state a cause of action for private nuisance. "Unlike

trespass, which arises from the exclusiveness of possession and requires a physical entry onto property, a claim of private nuisance arises from an interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are: ‘(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.’” *Berenger v. 261 West LLC*, 93 A.D.3d 175, 182 (1st Dept 2012) (internal citations omitted).

In the present case, 13D merely alleges that the marijuana use interfered with Investor Communications’s ability to conduct its business in the office space, not that it interfered with any use 13D made of the office space. In fact, it is undisputed that 13D did not itself use the office space. Thus, 13D has failed to state a cause of action for private nuisance.

13D’s arguments that its counterclaims state causes of action because 13D was formed for the purpose of acquiring a leasehold interest for the operation of Investor Communications, which is a common practice, and because counterclaim-defendants were aware that Investor Communications would be using the office space, are without merit and unsupported by any case law cited by 13D. Regardless of why 13D was formed or whether counterclaim-defendants knew of the use of the premises by Investor Communications, 13D has failed to assert that it suffered any harm, thereby allowing it to state causes of action on any of its counterclaims.

Moreover, if Investor Communications had brought the counterclaims instead of 13D, Investor Communications would not have standing as a subtenant “ha[s] no cause of action... for constructive eviction, breach of the lease agreement [or] breach of the covenant of quiet enjoyment” where there is no contractual agreement or landlord-tenant relationship between the owner and the subtenant, as it is undisputed that 13D, rather than Investor Communications, was the tenant pursuant to the lease. *See also Wright v. Catcendix Corp.*, 248 A.D.2d 186 (1st Dept

1998). “[O]ne corporation will generally not have legal standing to exercise the rights of other associated corporations.” *Alexander & Alexander of N.Y. v. Fritzen*, 114 A.D.2d 814, 815 (1st Dept 1985).

The court now turns to counterclaim-defendants’ motion to dismiss 13D’s and Squire’s affirmative defenses. Pursuant to CPLR § 3211(b), “[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.” On such a motion, defenses that consist of bare legal conclusions without supporting facts will be stricken. See *Robbins v. Growney*, 229 A.D.2d 356, 358 (1st Dept 1996). However, the First Department has made clear that the assertion of the defense of failure to state a cause of action in an answer, while surplusage as it may be asserted at any time even if not pleaded, “should not be subject to a motion to strike.” *Riland v. Todman & Co.*, 56 A.D.2d 350, 353 (1977).

In the present case, counterclaim-defendants’ motion to dismiss 13D’s and Squire’s affirmative defenses is denied as to the first affirmative defense that the complaint fails to state a claim upon which relief can be granted, but is granted as to the remaining affirmative defenses as they are conclusory. Moreover, the affirmative defense of accord and satisfaction must be dismissed with prejudice as it is barred by Article 25(A) of the lease, which states that “[n]o...endorsement or statement of any check or any letter accompanying any check or payment as rent [shall] be deemed an accord and satisfaction.” See *225 E. 64th St., LLC v. Janet H. Prystowsky, M.D. P.C.*, 96 A.D.3d 536, 538 (dismissing affirmative defense of accord and satisfaction where the lease precluded partial payments in settlement of unpaid rent). If 13D and Squire wish to replead their second, third, fourth and fifth affirmative defenses, with the exception of the affirmative defense of accord and satisfaction included in the third affirmative defense, 13D and Squire may make a motion to amend the Answer to allege nonconclusory facts in support of

