

Bruno Pizza LCC v 9300 Realty
2016 NY Slip Op 31089(U)
June 10, 2016
Supreme Court, New York County
Docket Number: 157661/15
Judge: Barry R. Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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BRUNO PIZZA LCC,

Plaintiff,

Index No.157661/15

-against-

Mot Seq 003

9300 REALTY, 99-105 THIRD AVENUE REALTY, LLC,
STEVEN CROMAN, OREN GOLDSTEIN, HARVEY
BOJARSKY, TOWER BROKERAGE, INC., ROBERT
PERL and GARY AUSLANDER,

Defendants.
-----X

OSTRAGER, J.:

Plaintiff Bruno Pizza LLC ("Bruno") commenced this action seeking declaratory relief and damages in connection with a commercial lease it executed in August 2013 for commercial premises at 204 East 13th Street in Manhattan that Bruno intended to use as a wood-fired gourmet pizza restaurant. The lease identifies defendant 99-105 Third Avenue Realty LLC as the owner of the premises. Defendant Steven Croman signed the lease on behalf of the owner as its managing member. Defendant Tower Brokerage, Inc. served as the owner's broker in connection with the lease. The tenant's request for relief is based primarily on allegations that the owner failed to timely approve the tenant's proposed alterations and failed to correct violations at the premises, which caused delays in the tenant's ability to occupy and use the premises in accordance with the lease.

Before the Court at this time is a pre-answer motion to dismiss pursuant to CPLR §3211(a)(1) and (7) by defendant Tower Brokerage, Inc. on behalf of the corporation and the affiliated individuals named herein as defendants; i.e., Harvey Bojarsky, the Chief Operating Officer of Tower, Robert Perl, the President, and Gary Auslander, an

agent (collectively referred to hereafter as the Tower Defendants). The Tower Defendants correctly note that, but for the handful of allegations in the Complaint that identify the parties by name (§§ 8, 13-15), the only allegation relating to the Tower Defendants contends that "Defendants CROMAN and GOLDSTEIN [representatives of the owner] met with Plaintiff and BOJARSKY, an employee of TOWER BROKERAGE, on November 6, 2014" (§85). Via an affirmation from defense counsel and an affidavit from defendant Bojarsky, the Tower Defendants further assert that this action is a dispute between the tenant and the owner based on the terms of the commercial lease for which the broker, who is not a party to the lease, bears no responsibility.

The tenant opposes the motion, with counsel describing Tower's role as follows:

Plaintiff alleges in the Complaint a series of facts that can be reduced to this: Plaintiff is embroiled in a mess of litigation and logistic struggles with the non-moving Defendants [the owner] due to a deal brokered by the Tower Defendants. The Tower Defendants were complicit in the Original Lease and the Amended Lease that have caused the disputes at the heart of this matter. The Tower Defendants and the [owner] Defendants are complicit in the scheme to defraud Plaintiff.

(Weissman Aff at ¶4-5).

The tenant's principal, Demian Repucci, adds in his own affidavit that the Tower Defendants failed to disclose an alleged conflict of interest relating to the fact that Bojarsky had worked for the owner of the premises for an extended time before joining Tower. Repucci also alleges (at ¶ 3) that the Tower Defendants "made false representations about having [the tenant's] interest in mind throughout negotiation of the Bruno Pizza Original Lease and Amended Lease." In addition, Repucci contends (at ¶13) that "Bojarsky and Tower were complicit in the [owner's] plan to defraud Plaintiff

[by having the tenant make renovations to improve the space for the owner's benefit and then seeking to evict the tenant] in exchange for a brokers fee."

Presumably aware that the original Complaint contains no such allegations, plaintiff has cross-moved for leave to serve an Amended Complaint that asserts seven causes of action contained in 197 paragraphs spread over 16 pages (Cross-Motion, Exh A). The owner has taken no position on the cross-motion. The Tower defendants oppose the motion, asserting, among other things, that the claims against Tower continue to lack merit.

The only cause of action in the Amended Complaint that names Tower is the sixth cause of action, entitled "Fraud". There plaintiff alleges that Bojarsky and Tower "fraudulently induced Plaintiff to sign agreements with" the owner by representing that the owner was trustworthy when Tower knew that representation to be false. Tower and Bojarsky allegedly also represented to plaintiff that "the Lease Amendment terms constituted a good deal," knowing that representation to be false, so that Tower could secure a commission. Plaintiff alleges that it relied on that representation to his detriment.

While the merits of the fraud claim are questionable, particularly in light of the fact that Tower was the broker for the owner and not for the tenant, the Court finds that enough has been alleged to permit the amendment and to survive a 3211 pre-answer motion to dismiss. However, as neither the original Complaint nor the Amended Complaint contains any substantive allegations of wrongdoing by defendants Robert Perl and Gary Auslander, and no basis has been alleged to pierce the corporate veil so as to establish individual liability, Perl and Auslander are entitled to the dismissal of any

claims against them. Should discovery fail to substantiate plaintiff's claims against Tower and/or Bojarsky, those defendants may move for summary judgment on that ground at the appropriate time. No basis has been stated for an award of attorney's fees, and the Court in its discretion declines to impose sanctions.

Accordingly, it is hereby

ORDERED that the motion by the Tower defendants is granted to the extent of directing the Clerk to sever and dismiss all claims against defendants Robert Perl and Gary Auslander, and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is granted to the extent of granting plaintiff leave to file within ten (10) days of the date of this Order an Amended Complaint in the form attached to the moving papers, except that all reference to Perl and Auslander shall be deleted; and it is further

ORDERED that all remaining defendants shall serve and file an Answer to the Amended Complaint within twenty (20) days of the e-filing of the Amended Complaint; and it is further

ORDERED that discovery shall proceed in accordance with the prior orders of the Court, and counsel shall appear for a compliance conference on September 20, 2016 at 10:00 a.m. as previously scheduled.

Dated: June 10, 2016


J.S.C.
BARRY R. OSTRAGER
JSC