Flatbush Portfolio SPE, LLC v Taro Sushi N.Y. Inc.
2016 NY Slip Op 31207(U)
June 27, 2016
Supreme Court, Kings County
Docket Number: 504622/2015
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of June, 2016.

PRESENT: **HON. SYLVIA G. ASH**

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FLATBUSH PORTFOLIO SPE, LLC and REDSKY CAPITAL, LLC,

Plaintiff(s),

- against -

TARO SUSHI N.Y. INC.,

Defendant.

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TARO SUSHI N.Y. INC.,

Third-Party Plaintiff,

- against -

76-82 ST. MARKS, LLC,

Third-Party Defendant.

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DECISION / ORDER

Index # 504622/2015

The following papers numbered 1 to 10 read herein: Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-4
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Plaintiffs, Flatbush Portfolio SPE, LLC ("Flatbush") and RedSky Capital, LLC ("RedSky"), and non-party Marks Flatbush Associates, LLC ("MFA")(collectively referred to as "RedSky Entities") move for an Order pursuant to CPLR §1018 permitting the substitution of MFA as plaintiff in this action or, alternatively, permitting the joinder of MFA as co-plaintiff with Flatbush and RedSky, and amending all pleadings to reflect same. Defendant, Taro Sushi N.Y., Inc. ("Taro Sushi"), and Third-Party Defendant, 76-82 St. Marks LLC ("St. Marks"), oppose and cross-move, separately, for an Order granting them summary judgment dismissing the complaint.

Background

On or about April 1, 2010, Taro Sushi entered into a lease agreement with St. Marks for a portion of the building located at 244 Flatbush Avenue in Brooklyn, New York ("Property"). The lease term was for seven years plus an option to renew for an additional three years subject to certain conditions precedent.

On or about April 8, 2013, RedSky entered into a contract of sale with St. Marks for the purchase of the Property. In conjunction with the sale, St. Marks provided RedSky with a copy of a tenant estoppel certificate dated May 23, 2013 ("Estoppel Certificate") executed by Taro Sushi's President on behalf of Taro Sushi. Paragraph 8 of the Estoppel Certifcate provides that "[t]enant has no option to renew or extend the lease term except as follows [list or if none, say "None"]:" and "NONE" is filled out by hand.

On or about June 10, 2013, RedSky assigned all of its right, title and interest in the sale contract to Flatbush. The closing between Flatbush and St. Marks for the sale of the Property occurred on July 3, 2013.

According to Plaintiffs, in early 2015, a dispute arose between Flatbush and Taro Sushi regarding whether Taro Sushi maintained its right to exercise the option to renew under the lease given its representations in the Estoppel Certificate. As a result, Plaintiffs commenced this lawsuit on April 17, 2015, seeking a declaratory judgment that Taro Sushi does not have the right to renew under the lease due to its representations in the Estoppel Certificate.

Subsequent to this action's commencement, on October 8, 2015, Flatbush sold the Property to MFA and assigned all leases and rents to it. On January 19, 2016, Flatbush also assigned all of its rights to this litigation to MFA. Accordingly, RedSky Entities seek to substitute MFA as plaintiff or co-plaintiff in this action and to amend the pleadings to reflect same.

Taro Sushi opposes RedSky Entities' motion and cross-moves for summary judgment dismissing the amended complaint and granting it judgment on its counterclaim. Taro Sushi argues that, because neither St. Marks nor Taro Sushi provided the Estoppel Certificate to anyone but RedSky, neither Flatbush nor MFA can claim they relied on the Estoppel Certificate. Additionally, that Flatbush sold the Property to MFA on October 8, 2015, which is approximately five-and-a-half months after Taro Sushi gave Flatbush the renewal notice exercising its option to renew. Taro Sushi also points out that Plaintiffs admitted in their

responses to its First Notice to Admit that, at the time of Flatbush's acquisition of the Property, both Flatbush and RedSky were aware that the subject lease contained an option for Taro Sushi to renew and extend the lease term. It is Taro Sushi's position that the RedSky Entities, who are all sophisticated real estate entities, did not justifiably rely on the incorrect Estoppel Certificate having knowledge of the lease provisions and that such lease was never modified.

With regards to the incorrect content of the Estoppel Certificate, according to the affidavit of Yuji Sano, Taro Sushi's President, on May 14, 2013, St. Marks emailed him an undated tenant estoppel certificate with all handwriting including the indication that the tenant had no option to renew or extend the lease term, having already been inserted by St. Marks or its agents. Mr. Sano also avers that the Estoppel Certificate was accompanied by an email from Jason Baskind, a member of St. Marks, stating "Attached please find an estoppel letter that we need you to sign and send back. Please just sign and do not fill in any dates. Please send back all pages." Mr. Sano states that he merely signed the document and did not fill in any blanks.

Based on the foregoing allegations, Taro Sushi commenced a third-party action against St. Marks alleging fraudulent inducement.

St. Marks joins Taro Sushi in its opposition to the RedSky Entities' motion and also cross-moves for summary judgment arguing that St. Marks does not have any rights or obligations under the lease by virtue of the two assignment of leases. St. Marks submits that, since MFA's complaint does not state a cause of action against St. Marks and the third-party complaint concerns only the first transaction, which is no longer viable in light of the second sale of the Property to MFA, both the complaint and third-party complaint should be dismissed.

Discussion

"In the context of a commercial lease, an estoppel certificate will be enforced unless the certifying party can show a defense to the making of the document, such as fraud or duress or that the assignee accepted the certificate with knowledge of the contrary, and true, state of facts" (*Excelsior 57th Corp. v Excel Assoc.*, 2014 NY Slip Op 31789(U), 2014 NY Misc. LEXIS 3072, *8-9 [New York Cty 2014][*citing JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392, 812 NYS2d 506 [1st Dept 2006].

Here, it is undisputed that the RedSky Entities reviewed the lease at issue and were aware that it contained a lease renewal option. Further, that the RedSky Entities knew the lease had not been modified. In fact, the Estoppel Certificate, which the RedSky Entities rely upon, states clearly, in paragraphs (1) and (2), that the lease is "in full force and effect" and that "[t]here are

no amendments, supplements or modifications of any kind to the Lease except as set forth on Schedule 1." The word "NONE" is written out in Schedule 1. Thus, the RedSky Entities' reliance on the Estoppel Certificate to preclude Taro Sushi from exercising its option to renew is unreasonable and contrary to what they knew to be the true state of facts. In this regard, Taro Sushi has established its defense and the Estoppel Certificate cannot be enforced against Taro Sushi with respect to its option to renew.

In light of the foregoing, it is unnecessary to determine whether Flatbush and/or MFA can enforce the Estoppel Certificate as assignees to the rights of RedSky. However, the Court notes that, generally, a party asserting estoppel must show with respect to himself: "(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position" (*BWA Corp. v Alltrans Express U.S.A., Inc.*, 112 AD2d 850, 853 [1st Dept 1985]). Here, it would seem that neither Flatbush nor MFA would satisfy the first and third of the aforementioned prongs.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion to substitute is DENIED as moot; it is further

ORDERED that Defendant Taro Sushi's motion for summary judgment is GRANTED to the extent that Plaintiff's complaint is dismissed as against them and that judgment is granted on its counterclaim to the extent that the Estoppel Certificate does not preclude Taro Sushi from exercising its option to renew the lease for an additional three years; and it is further

ORDERED that Defendant St. Marks's motion for summary judgment is GRANTED.

This constitutes the Decision and Order of the Court.

E N T E R,

Sylvia G. Ash, J.S.C.