SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

----------X

384 COLUMBUS AVENUE ASSOCIATES, LLC
d/b/a OCEAN GRILL,

Plaintiff,

-against-

101 WEST 78TH, LLC

Defendant.

----------X

DECISION AND ORDER

Index No. 654317/2015
Mot. Seq. 001

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, breach of contract, declaratory judgment and negligence, 384 Columbus Avenue Associates, LLC d/b/a Ocean Grill ("plaintiff" or "tenant") alleges that 101 West 78th, LLC ("defendant" or "landlord" and together with plaintiff, the "parties") breached the lease by performing certain work outside of the premises, constructively evicted tenant, and negligently caused damages to tenant's business. Defendant moves to dismiss plaintiff's complaint ("Compl.") pursuant to CPLR §§ 3211(a)(1) and (a)(7) (mot. seq. 001). Plaintiff opposes.

Facts

Landlord and tenant entered into a lease (the "original lease") dated December 1, 1996, granting tenant possession of certain portions of the building located at 101

West 78th Street (the "premises"). Tenant was to use the premises for the express purpose of operating a restaurant and cocktail lounge. On May 26, 2011, landlord's predecessor-in-interest and tenant memorialized a modification of the lease (the "amended lease" and together with the original lease, the "lease").

In December 2012, landlord erected scaffolding around the entirety of the building, which was subsequently removed during the Spring of 2014. Plaintiff alleges that during this time, their earnings decreased by $176,961 and the value of the business decreased by $1,415,688. In November 2014, the landlord re-installed the scaffolding to complete work to the outside of the building and installed a hoist, netting and barricades on the street directly in front of the premises. Plaintiff alleges that due to this re-installation, their earnings and the value of the business steadily declined.

Tenant closed its business on December 21, 2015 and entered into an agreement with landlord in which it officially surrendered its tenancy rights (the "surrender agreement"). Tenant commenced this action on December 31, 2015 and subsequently filed an amended complaint on March 7, 2016 setting forth claims for breach of contract and/or constructive eviction, a declaratory judgment, and negligence. Landlord moves to dismiss the complaint (mot. seq. 001).

Analysis

Legal Standard

On a motion to dismiss on the ground that defenses are founded upon documentary evidence pursuant to CPLR §3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. CPLR 3211(a)(1); Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are

discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

Defendant's Motion to Dismiss Plaintiff's Cause of Action for Breach of Contract

Defendant's motion to dismiss plaintiff's first cause of action for breach of contract is denied. In determining the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing. Ashwood Capital, Inc. v OTG Mgt., Inc., 99 A.D.3d 1 (1st Dept 2012); Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s, 243 A.D.2d 1, 6 (1st Dept 1998). A clear, complete document will be enforced according to its terms. Ashwood Capital, 99 AD3d at 7.

When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to decide. Id. Whether there is ambiguity "is determined by looking within the four corners of the document, not to outside sources." Kass v Kass, 91 N.Y.2d 554, 566 (1998). The court examines the parties' obligations and intentions as manifested in the entire agreement and seeks to afford the language an interpretation that is sensible,

practical, fair, and reasonable. Riverside S. Planning Corp. v CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 404 (2009); Abiele Contr. v New York City School Constr. Auth., 91 N.Y.2d 1, 9-10 (1997); Brown Bros. Elec. Contr. v Beam Constr. Corp., 41 N.Y.2d 397, 400 (1977).

A contract is not ambiguous if, on its face, it is definite and precise and reasonably susceptible to only one meaning. White v Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Greenfield v Philles Records, 98 N.Y.2d 562, 569 (2002). An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning. Chimart Assoc. v Paul, 66 N.Y.2d 570, 573 (1986). Usually, the construction of an ambiguous contract is a matter for the fact finder and a pre-trial motion is inappropriate. China Privatization Fund (Del), L.P. v Galaxy Entertainment Group Ltd., 95 A.D.3d 769, 770 (1st Dept 2012).

An exception exists where the court can resolve the ambiguity by looking at the document alone, without turning to evidence outside the document. Hudson-Port Ewen Assoc. v Chien Kuo, 165 A.D.2d 301, 303 (3d Dept 1991), *affd* 78 N.Y.2d 944 (1991). However, where determination of the parties' intent depends on items such as credibility and/or extrinsic evidence of the parties' intent, then construction is for the trier of fact and not to be determined in the context of a pre-trial motion. Amusement Bus. Underwriters v American Intl. Group, 66 N.Y.2d 878, 880-881

(1985); Noho Light. & Elec. Supply Co. v Simon, 45 A.D.3d 391, 392 [1st Dept 2007).

The First Department's ruling in Duane Reade v. Reva Holding Corp., 30 A.D.3d 229 (1st Dept 2006), is particularly instructive to the case at hand. In Reva, the parties entered into a commercial lease, which included article 4, as part of the standard lease and article 84, as part of the rider to the lease. Article 4, which is identical to the provision contained in the lease between landlord and tenant, stated as follows:

> Except as specifically provided in Article 9 or elsewhere in this Lease, there shall be no allowance to the Tenant for the diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or other making or failing to make any repairs, alterations, additions or improvements in or to any portion of the building...[1]

Id. at 235. Reva argued that Duane Reade's damages for its alleged business interruption losses were barred by the exculpatory clauses in article 4. The court held that article 84 of the lease specifically provided otherwise. Article 84, in pertinent part, states "in making repairs to the premise, Owner shall not unreasonably interfere with the operation of Tenant's business." Id. The court held that due to the language contained in the rider, article 84 took precedence over article 4 in the case of a dispute and found that Duane Reade had a legal remedy in the event that Reva's

[1] Article 4 in Reva is identical to article 4 in the case at hand and therefore, will not be reproduced in the discussion, *infra*.

work "on the building 'unreasonably interferes with the operation of Tenant's business." Id.

Here, landlord seeks to distinguish the Reva holding by arguing that the provision at issue in Reva specifically mentioned interference with tenant's business. See Reply Memorandum, p. 15. Although article 78 contained in the lease at issue does not specifically mention interference with tenant's business, there is no other viable explanation for the provisions contained in article 78.[2] Clearly, one of the purposes of this article included the lack of interference with tenant's business through the scaffolding process. Landlord also seeks to distinguish Reva by alleging that there was no specific damages clause, whereas in this case, there is. However, this argument conflates the issues. Landlord wants this court to hold that because the parties did not specifically enumerate damages for loss of profits or loss of business value, that tenant is precluded from bringing this claim under article 4, particularly where there is an indemnity clause contained in the article in question. See Reply Memorandum, p. 15-18. However, the court in Reva articulated that "typewritten [rider] provisions of the lease take precedence over printed provisions to the extent of any conflict." Reva, 30 A.D. 2d at 236. The holding in Reva does not require that the parties to a lease articulate a specific damages remedy in the conflicting

[2] Article 78 of the lease specifically states, "(b) Owner shall use its best efforts not to allow the work to be performed in such manner as will disrupt with the means of ingress and egress to the demised premises from the public sidewalks in front of the Demised premises...(d) Owner, will have such construction of the barricades and scaffolding in such manner to allow maximum means of lighting and means of ingress and egress."

provision, rather there only needs to be a provision that contemplates another remedy. Id. at 235. Here, the rider specifically states that "the provisions of [the] rider shall prevail and govern and the contradicted or inconsistent provisions of said lease shall be deemed amended accordingly." Lease ¶40. Therefore, article 78 governs the matter.

Landlord argues that even if article 78 does govern, that provision 78(f) prohibits any recovery for lost profits or lost business value. Specifically, article 78(f) states,

> Owner hereby further covenants and agrees to indemnify and save harmless Tenant of and from all claims, counsel fees, losses, damages, howsoever caused to any property or person prior to the completion of Owner's work of occurring after such completion, as a result of anything done or omitted to have been done in connection with or arising out of any incidents, fines, penalty or out of any matter or thing connected with Owner's work.

However, contrary to landlord's argument, article 78(f) does not stand for the proposition that the only liability for damages is to property or person. Rather, the provision indemnifies tenant in the situation in which physical damage is done to the premises or to a person while landlord's work is on-going, and does not preclude any other type of damage claims. The lease then, is ambiguous as to what damages tenant would be entitled to. As the lease is ambiguous, it becomes a matter for the fact-finder and a pre-trial motion is inappropriate. China Privatization Fund, 95 A.D.3d 769, 770. Therefore, landlord's motion to dismiss plaintiff's claim for a breach of contract is denied.

The parties also dispute the types of damages that are appropriate in this action. Plaintiff alleges that they are entitled to damages for lost business value and damages for lost profits. Defendant disputes that plaintiff is entitled to either of these types of damages. In actions for breach of contract, a party may seek direct damages and consequential or special damages. See American List Corp. v. U.S. News & World Report, 75 N.Y.2d 38 (1989); Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187, 192 (2008); Kenford Co. v. County of Erie, 73 N.Y.2d 312 (1989). The tenant's claimed damages to its business is consequential in nature.

In a motion to dismiss, the facts must be read in the light most favorable to the plaintiff. See Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court must read plaintiff's allegations that they suffered a loss of profit and a loss of business value as true. As discussed *supra*, the lease does not preclude the types of damages that plaintiffs allege, therefore, the motion to dismiss is premature and is denied.

Defendant's Motion to Dismiss Plaintiff's Claim for Declaratory Relief

Defendant's motion to dismiss plaintiff's claim for declaratory relief based upon an allegation of constructive eviction[3] is denied. "A cause of action for constructive eviction is governed by a one-year statute of limitations" contained in

[3] Throughout its opposition papers, plaintiff conflated its breach of contract and constructive eviction claims. For purposes of this decision, they have been parsed into two separate claims.

CPLR § 215. Kent v. 534 East 11th Street, 80 A.D.3d 106 (1st Dept 2010). The Statute of Limitations of this claim begins to run at "such time that it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return." Gold v. Schuster, 264 A.D.2d 547, 549 (1st Dept 1999); see also PK Restaurant, LLC v. Lifshutz, 138 A.D.3d 434 (1st Dept 2016); Ocean Grille, Inc. v. Pell, 226 A.D.2d 603, 641 (2d Dept 1996). The date that tenant was evicted cannot be determined on the record before this court as a matter of law. Landlord argues that tenant was evicted in November 2014, when the scaffolding was erected and the lease was allegedly breached. See Reply Memorandum, pp. 7-10. However, by the landlord's own admission, tenant was allowed to continue using the space as a restaurant until the surrender agreement was executed, on December 21, 2015. As there is an issue of fact as to when the eviction occurred, defendant's motion to dismiss is denied.

Defendant also argues that even if the Statute of Limitations is not met, the motion to dismiss should still be granted based upon the unreasonable delay of tenant to vacate the premises. A "constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77,83 (1970). "To be an eviction, constructive or actual, there must be a wrongful

act by the landlord." Carlyle, LLC v. Beekman Garage LLC, 133 A.D.3d 510 (1st Dept 2015); 737 Park Ave. Acquisition LLC v. Robert B. Jetter, M.D., PLLC, 46 Misc.3d 135(A) (1st Dept 2014) ("Alterations to leased premises, made with the consent of the tenant, do not amount to an eviction, no matter how extensive or the degree of interference with the tenant's occupancy.") Here, landlord erected a hoist in front of tenant's entrance at some point during 2015, which also allegedly caused tenant to lose its sidewalk café business. Tenant also alleges that the excessive noise, vibrations, odors and dust entering the premises as a result of the reconstruction work violated tenant's right to quiet enjoyment. In taking all of the plaintiffs' allegations as true, there is a viable cause of action that there was a wrongful acted committed by the landlord. Therefore, in this preliminary stage, plaintiff has adequately pleaded that defendant has breached the lease.

Second, "a constructive eviction requires an abandonment of the premises without unreasonable delay." GSL Enterprises, Inc., v. Bella Carla Fashions, Inc., 1996 WL 34573256 (Sup Ct N.Y. Cnty. 1996), citing Leider v. 80 Williams St. Co., 22 A.D.2d 952 (2d Dept 1964); M.Y. Realty Corp., 19 A.D.3d 156 (1st Dept 2005). A delay in vacating the premises which is due to the tenant's efforts to resolve the dispute without litigation of a constructive eviction claim is a reasonable excuse. See Incredible Christmas Store-New York, Inc. v. RCPI Trust, 307 A.D.2d 816 (1st Dept 2003). As discussed *supra*, there is a question of fact as to when the constructive

eviction actually occurred. Landlord claims that the eviction occurred when the scaffolding was erected in November 2014. See Reply Memorandum, pp. 7-10. Tenant contends that it was the erection of the hoist directly in front of the premises' entrance, in violation of article 78(b), that constituted the breach and caused the eviction. See Memorandum of Law in Opposition, p. 18. Neither party provides any date as to when this hoist was erected. As there is an inherent ambiguity, defendant's motion to dismiss must be denied.

Defendant's Motion to Dismiss Plaintiff's Cause of Action for Negligence

Defendant's motion to dismiss plaintiff's cause of action for negligence is granted. When a negligence claim is based on the same facts as a breach of contract claim, the negligence claims is dismissed as duplicative. Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 389 (1987) ("A simple breach of contract claim is not to be considered a tort unless a legal duty independent of the contract itself has been violated...[the] legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract"); Van Sengbusch v. Les Bateaux De N.Y., Inc., 128 A.D.3d 409 (1st Dept 2015); Sebastian Holdings, Inc. v. Deutsche Bank, AG., 108 A.D.3d 433 (1st Dept 2013). Plaintiff asserts in the amended complaint that "Landlord's reconstruction work breached the lease because it caused excessive noise, vibrations odors and dust...water leaks and flooding into Tenant's

leased premises" and asserts the same conduct for its negligence cause of action. Compl. ¶¶ 49-50, 72-73; see also Memorandum of Law in Opposition, p. 19.

Plaintiff's reliance on 905 5th Assocs., Inc. v. Weintraub, 85 A.D.3d 667 (1st Dept 2011) is misguided. In Weintraub, a doctor sought recovery for property damage and economic loss sustained as a result of the Weintraubs' renovation of their apartment, which was located directly above the doctor's medical office. Id. at 667. There were no claims for breach of contract and the holding of the case is that there is a duty of care that extends to those who suffer property damage as a result of construction on their property. Id. at 667. However, the case does not deal with duplicative claims or the ability for a party to sue for negligence and breach of contract based on the same alleged facts. Therefore, defendant's motion to dismiss plaintiff's cause of action for negligence is granted.

Accordingly it is,

ORDERED that defendants' motion to dismiss plaintiffs cause of action for breach of contract is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiffs cause of action for declaratory judgment is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiffs cause of action for negligence is granted.

Date: September 6, 2016
New York, New York

Anil C. Singh