Central Parking Sys. of N.Y., Inc. v Quik Park (Leaseco III) LLC
2016 NY Slip Op 31766(U)
September 23, 2016
Supreme Court, New York County
Docket Number: 103417/2009
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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CENTRAL PARKING SYSTEM OF NEW YORK, INC.,

Plaintiff,

- against -

QUIK PARK (LEASECO III) LLC, QUIK PARK NYC (LEASECO) LLC, QUIK PARK NYC HOLDINGS LLC, QUIK PARK BROADWAY GARAGE LLC, QUIK PARK WEST 56TH ST. LLC and BROADWAY & 56TH STREET ASSOCIATES, L.P.,

Defendants.

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DECISION AND ORDER

Index No. 103417/2009

Mot. Seq. 002 and 003

KELLY O'NEILL LEVY, J.:

The court issues the following consolidated decision on motion sequences 002 and 003.

Plaintiff Central Parking System of New York, Inc. (Central Parking) moves pursuant to CPLR 3126 for an order striking Quik Park West 56th St. LLC and Broadway & 56th Street Associates, L.P.'s pleadings for their failure to comply with discovery demands, or in the alternative, for an order precluding those defendants from offering any evidence at trial; or in the alternative, for an order compelling their outstanding discovery responses within a prescribed time period (motion sequence 002). Defendants Quik Park Broadway Garage LLC and Broadway & 56th Street Associated L.P. oppose and cross-move for summary judgment pursuant to CPLR 3212.

In motion sequence 003, Central Parking moves pursuant to CPLR 3212 for summary judgment and to dismiss the counterclaims against it in this action alleging economic damages as a result of defendants' unlawful retention of certain parking lifts owned by Central Parking. Defendants Quik Park (Leaseco III) LLC, Quik Park NYC (Leaseco) LLC, Quik Park NYC Holdings LLC, and Quik Park West 56th St. LLC cross-move, pursuant to

CPLR 3211(a)(1) and (a)(7) to dismiss the amended complaint. The motion is granted in part and the cross-motion is denied for the reasons set forth below.

Facts

The following facts are undisputed. Pursuant to a September 9, 1992 lease agreement, plaintiff Central Parking leased space located at 235 West 56th Street in in Manhattan (the premises) from defendant Broadway & 56th Street Associates (landlord) to operate a parking garage. The lease was renewed through September 30, 2007 by a lease extension dated June 13, 2002. On September 28, 2007, two days before the end of the lease extension, the landlord entered into a 15-year lease with Quik Park Broadway Garage LLC (Quik Park Broadway), which also planned to use the premises as a parking facility. The day after Central Parking left the premises, Quik Park Broadway entered into possession.

Central Parking left 48 SpaceMaker vehicle lifts at the premises when it vacated, which are the subject of this litigation. According to Quik Park Broadway and Central Parking, the lifts remain at the premises where they continue to be used by Quik Park Broadway, save for an estimated two out of the 48 that Quik Park Broadway asserts were replaced. Quik Park Broadway has refused Central Parking's attempts to gain access to the premises to remove the lifts asserting that it has a right to use the lifts because it believes that Central Parking abandoned them by leaving them there after the expiration of its lease (Llopiz Tr. 39-40) and removal of the lifts while Quik Park Broadway is operating the garage would adversely impact its business (*id.* at 40, 72).

The circumstances around Central Parking's decision to leave the lifts at the premises are at issue. It is undisputed from the depositions of Hector Chevalier, Senior Vice President at Central Parking; Rafael Llopiz, owner of all "Quik Park" entities sued herein; and Dennis Brady, Executive Managing Director of Leasing for Jack Resnick & Sons (produced as a witness for defendant Broadway & 56th St. Associates, L.P.) that prior to Quik Park

Broadway's taking possession of the premises, there was a lunchtime discussion among Chevalier, Llopiz, and Brady, convened by Brady, concerning the future of the lifts. Whether an agreement was reached remains a point of contention. Central Parking contends that it left the 48 lifts at the premises because it had worked out a deal with Mr. Llopiz wherein Quik Park would buy the lifts for between $43,000 and $44,000 and was promised payment within 48 hours. The payment never arrived. Chevalier testified that he spoke about the lifts with Brady three or four times after Central Parking vacated the premises and with Llopiz by phone once approximately three months after vacating. Chevalier Tr. 43-47. A demand letter for the lifts was not sent until April 2008 due to the time it took to receive the requisite internal clearances. Chevalier Tr. 48.

Quik Park Broadway's position, through its principal Mr. Llopiz, is that a deal was never reached (Llopiz Aff. ¶ 7-8) and that Central Parking abandoned the lifts likely due to the expense of removing them (Llopiz Tr. 75-76). Brady testified that though Central Parking believed that it had reached a deal with Quik Park Broadway for the purchase of the lifts (Brady Tr. 36), Chevalier and Llopiz could not agree to a value on the lifts and no deal was reached at the lunch. Brady Tr. 46-47.

In their cross-motion, defendants argue that the only named defendant bearing "Quik Park" in its name against whom plaintiff might have a claim is Quik Park Broadway (Llopiz Aff. ¶ 12) and that accordingly, the complaint against Quik Park (Leaseco III) LLC, Quik Park NYC (Leaseco) LLC, Quik Park NYC Holdings LLC, and Quik Park West 56th St. LLC should be dismissed pursuant to CPLR 3211 (a)(1) and (a)(7).

Discussion

"[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

material issues of fact from the case.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st Dep't 2010), *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the movant meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 AD3d 147, 152 (1st Dep't 2012), *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986).

In its amended complaint, plaintiff sets forth causes of action for unjust enrichment; conversion; punitive damages for intentional tort; and injunctive relief.

The court first examines motion sequence 003, Central Parking's motion for summary judgment. To prove unjust enrichment, plaintiff must show that "a benefit was bestowed...by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor." *Tarrytown House Condominiums, Inc. v. Hainje*, 161 AD2d 310, 313 (1st Dep't 1990). Here it is undisputed that Central Parking left the subject lifts at the premises and that Quik Park has continued to receive a valuable benefit without compensating Central Parking for their use. However, the circumstances behind that leaving of property is at issue with defendants claiming that the vehicle lifts were abandoned and plaintiff maintaining that they were not removed pursuant to its deal with Mr. Llopiz.

Defendants point to language in the lease between Central Parking and Quik Park Broadway contains language concerning abandonment of property following a tenant's removal from the premises. Pursuant to Article 3 of the lease (Exhibit Q to the Fixler Aff.), "All property permitted or required to be removed by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or may be removed from the premises by

Owner at Tenant's expense." Article 21 of the lease reads in part, "Upon the expiration of the term of the lease, Tenant shall quit and surrender to the Owner the demised premises, broom clean, in good order and condition, ordinary wear excepted, and Tenant shall remove all its property. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease."

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006)(internal citations omitted). Here, it is undisputed that the lifts were the property of Central Parking. However, while the landlord has denied that it is asserting possession of the lifts (Brady Tr. 60), Quik Park argues that Central Parking "left th[e] lifts behind" and "as far as I'm concerned, [the lifts] are mine." (Llopiz Tr. 39). *See id.* at 70-71.

Plaintiff argues in reply that Quik Park (Leaseco III) LLC, Quik Park NYC (Leaseco) LLC, Quik Park NYC Holdings LLC, Quik Park Broadway Garage LLC, and Quik Park West 56th St. LLC waived their right to assert an abandonment defense when they entered into a stipulation on August 15, 2013 withdrawing their opposition to Broadway & 56th Street Associates earlier cross-motion for summary judgment.[1] The stipulation states in part that the defendants "CONSENT to [Broadway & 56th Street Associates, L.P.'s] Cross Motion." Included in that cross-motion to which defendants consented was language that "Quik Park...cannot 'piggyback' on the Landlord's rights under the Plaintiff's lease in order to

[1] The cross-motion was denied by decision/order of October 9, 2013 (Singh, J.).

justify any refusal to allow Plaintiff to remove its lifts once good faith negotiations between those two parties failed. Plaintiff's lease was not intended to benefit Quik Park since the abandonment is an option that can only be claimed by the Landlord and the Plaintiff's lease was made years before Quik Park was contemplated as a successor tenant." Ex. I to the Fixler Aff. at ¶ 14. The court deems the abandonment defense waived pursuant to the August 15, 2013 stipulation. *See generally Levine v. Pita Grill II*, 69 AD3d 496, 496 (1st Dep't 2010).

Accordingly, as to motion sequence 003, plaintiff's motion for summary judgment is granted against defendant Quik Park Broadway Garage LLC only on the causes of action for unjust enrichment and conversion. The remainder of plaintiff's motion is denied.

<u>Defendants' Cross-Motion (Mot. Seq. 003)</u>

Defendants Quik Park (Leaseco III) LLC, Quik Park NYC (Leaseco) LLC, Quik Park NYC Holdings LLC, and Quik Park West 56th St. LLC (Cross-Moving Defendants) cross-move for dismissal of the complaint. Cross-Moving Defendants argue that pursuant to CPLR 3211 (a) (1) and (a) (7), the complaint against the cross-moving defendants should be dismissed on the grounds that such claims are barred by documentary evidence and fail to state a cause of action.

When a defendant moves under CPLR 3211 (a) (1), it has the burden of submitting documentary evidence that, on its own, "resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." *Fortis Fin. Servs. v. Fimat Futures USA*, 290 AD2d 383, 383 (1st Dep't 2002)(citing to *Scadura v. Robillard*, 256 AD2d 567, 567 (2d Dep't 1998)). Dismissal of a complaint on the ground of documentary evidence is warranted where the evidence submitted conclusively establishes a defense as a matter of law. *See 150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 AD3d 1, 5 (1st Dep't 2004).

CPLR 3211 (a) (7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). If the court "determine[s] that the plaintiff[is] entitled to relief on any reasonable view of the facts stated, [its] inquiry is complete" and the complaint must be declared legally sufficient. *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307, 318 (1995). The cross-moving defendants have failed to make a case for dismissal here.

Cross-moving Defendants argue that because the lease at issue was between Broadway & 56th Street Associates and Quik Park Broadway only, the complaint should be dismissed against other "Quik Park" entities. However, while it is true that the lease is between those parties only and the affidavit of Mr. Llopiz states that, "Some of the Quik Park Defendants – including Quik Park Broadway – are separate entities," (Llopiz Aff 13), that is not clear as the deposition testimony of Mr. Llopiz raises an issue about the relationship between Quik Park Broadway and the other "Quik Park" entities. *See* Llopiz Tr. 9, 11-12, 17. Accordingly, dismissal is not warranted.

Motion Sequence 002

Plaintiff's motion made pursuant to CPLR 3126 for an order striking Quik Park West 56th St. LLC and Broadway & 56th Street Associates, L.P.'s pleadings for their failure to comply with discovery demands is granted only to the extent that Broadway & 56th Street Associates and Quik Park West 56th St. LLC are to produce annual profit and loss statements provided by Quik Park to 56th Street Associates as well as documents related to the corporate

structure of Quik Park that were mentioned during the deposition of Mr. Llopiz on or before October 31, 2016. The remainder of the motion is denied.

Defendants' cross-motion for summary judgment (motion sequence 002) is denied. As noted above, the defendants already moved for summary judgment which was denied by Justice Singh on October 9, 2013. Absent a showing of newly discovered evidence or other sufficient justification, "successive motions for summary judgment should not be entertained." *Jones v. 636 Holding Corp.*, 73 A.D.3d 409, 409, 899 N.Y.S.2d 605 (1st Dept.2010). *See also Fleming and Assocs, CPA, P.C. v. Murray & Josephson, CPAs, LLC*, 127 AD3d 428, 428 (1st Dep't 2015). Here, defendants have failed to present adequate justification for their bringing a successive motion for summary judgment, and accordingly, the cross-motion is denied.

Order

Accordingly, it is hereby ORDERED that the motion of plaintiff Central Parking to strike, etc. (mot. seq. 002) is granted only to the extent that defendants shall produce the documentation as set forth above, and it is further

ORDERED that defendants' cross-motion (under mot. seq. 002) is denied; and it is further

ORDERED that the motion of plaintiff Central Parking for summary judgment (mot. seq. 003) is granted only to the extent that summary judgment shall be entered against defendant Quik Park Broadway Garage LLC on the causes of action for unjust enrichment and conversion only, and it is further

ORDERED that defendants' cross-motion (under mot. seq. 003) is denied; and it is further

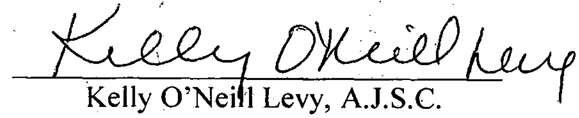
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue.

The court encourages the parties to communicate regarding settling of this matter. As Mr. Llopiz noted during his deposition, he was "all for settling it. It just has to make sense for both sides, that's all." Llopiz Tr. 73.

This constitutes the decision and order of the court.

Date: September 23, 2016



Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.