LKE Catering, Inc. v Legacy Yards Tenant LLC
2016 NY Slip Op 32004(U)
October 19, 2016
Supreme Court, New York County
Docket Number: 651041/2016
Judge: Anil C. Singh

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

LKE Catering, Inc.,		
Plaintiff,	:	Index No. 651041/2016
-against-	:	DECISION AND ORDER
	:	Motion Sequence No. 001
Legacy Yards Tenant LLC,		
Defendant.	:	

HON. ANIL C. SINGH:

In this action for breach of contract and breach of implied covenant of good faith and fair dealing, defendant Legacy Yards Tenant LLC ("Legacy" or "Licensor") moves to dismiss the complaint. Plaintiff LKE Catering ("LKE" or "Licensee") opposes.

On August 1, 2013, defendant Legacy entered into a Food Service License Agreement (the "Agreement") with plaintiff LKE.

In its complaint, plaintiff alleges that defendant breached the Agreement by (1) limiting plaintiff to providing food and beverages to Tower C; (2) prohibiting plaintiff from operating at the Project Site[1] for months by failing to move the trailer to the License Area and by relocating the trailer multiple times; (3) failing to provide utilities including propane gas; (4) failing to provide LKE with a serving

[1] All capitalized terms are defined in the Agreement.

kiosk; (5) failing to provide two parking spaces near the License Area for plaintiff's use; and (5) permitting unauthorized vendors to operate at the Project Site in violation of the Agreement.

Analysis

Standard for a motion to dismiss

On a motion to dismiss based on the ground that the defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. See, Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). Dismissal is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations, and conclusively establishes a defense to the asserted claims as a matter of law." See, Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc., 120 A.D. 3d 431, 433 (1st Dept 2014). Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See, 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 true, 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).

First Cause of Action for Breach of Contract

Scope of the License

There is no dispute among the parties that the Project Site is not limited to Tower C but encompasses the whole Eastern Rail Yards.[2] There is also no dispute that the license runs through December 31, 2018 as stated in Section 9 of the Agreement.

[2]WHEREAS, Licensor intends to develop and a construct commercial office building (known as "Tower C"), located at the northwest corner of West 30th Street and 10th Avenue which is on a portion of the property known as the Eastern Rail Yard Section of the John D. Caemmerer West Side Yard in New York, New York, which property Licensor ground leases from the Metropolitan Transportation Authority ("MTA"), and adjacent thereto the Long Island Railroad Company ("LIRR") a subsidiary of MTA, uses and operates a commuter railroad and maintenance facility in connection with the operation of the Long Island Railroad system (collectively, the "Project Site");

However, defendant contends that while the scope of the exclusive license provided that plaintiff would be the exclusive food and beverage service provider on the Project Site, the services that plaintiff is permitted to perform under the Agreement is limited to Tower C. Defendant relies on the second and third paragraph of the Whereas clause in the Agreement which states that,

> WHEREAS, Licensor, in furtherance of the construction of Tower C, has retained the services of certain contractors, subcontractors, consultants and other construction workers, employees and professionals (collectively, the "Workers");
>
> WHEREAS, Licensor desires to make food and beverages available for purchase by Workers at the Project Site, and Licensee desires to access the Project Site in order to sell such food and beverages (the "Services")

Defendant argues that as stated in the second clause the Workers that were to be serviced were retained "in furtherance of the construction of Tower C".

A close reading of the Whereas Clause in its entirety shows that the Whereas clause is, at best, ambiguous as to whether the Agreement limits plaintiff's performance of services to Tower C. It is clear that the third clause contemplates that the plaintiff desires to access the Project Site, not only Tower C, to sell food and beverages. Moreover, the rest of the Agreement refers to the Project Site or to Services and not to Workers. See e.g., Section 6 and Section 8(i).

Section 8 of the Agreement also provides that the "Licensor (defendant) warrants that Licensee (plaintiff) shall be the exclusive food and beverage provider

on the Project Site during the term of the Agreement". Correspondingly, Section 9 of the Agreement provides that, "The term of this Agreement shall expire upon the earlier of: (a) termination pursuant to paragraph "10" below; or (b) December 31, 2018." There is no provision in the Agreement that limits plaintiff to selling food and beverage only at Tower C.

Accordingly, the Agreement does not limit the plaintiff to providing their food and beverage service to Tower C workers.

Trailer

In its Complaint, plaintiff also alleges that defendant breached the Agreement by failing to move plaintiff's trailer to the License Area and relocating the trailer in September 2014, March 2015, August 2015 and October 2015, forcing plaintiff to cease operations at the Project Site.

Plaintiff's claim that defendant failed to move the plaintiff's trailer to the License Area for approximately six months withstands scrutiny. Plaintiff alleges that the trailer was delivered to the Project Site on or around January 2014 but the trailer was only moved to the License Area on or around June 2014. Section 8(ii) of the Agreement states that defendant "shall provide adequate space within the License Area to accommodate Licensee's trailer." Defendant's argument that the Agreement does not provide a date certain within which defendant was required to

permit plaintiff to commence its services is unavailing. In Savasta v 470 Newport Assoc., 82 NY2d 763, 765 (1993), the court held that "[w]hen a contract does not specify time of performance, the law implies a reasonable time." The court further held that, "what constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case." Id. In Savasta, the court held that the limited partners' 22-month delay in invoking the termination provision of a partnership agreement was unreasonable. The court reasoned that the limited partners took advantage of the termination provision only after accepting the benefit of the agreement for 22 months. See also, Zev v. Merman, 73 N.Y.2d 781 (1988) ("Included within a court's determination of reasonableness are the nature and object of the contract, the previous conduct of the parties, the presence or absence of good faith, the experience of the parties and the possibility of prejudice or hardship to either one, as well as the specific number of days provided for performance"); Weksler v Weksler, 140 AD3d 491, 492 (1st Dept 2016) (same).

Here, a 6-month delay in moving the plaintiff's trailer to the License Area is unreasonable as it prevented plaintiff from operating for those 6 months. The Agreement was effective September 1, 2013. See, Section 9. Plaintiff provided the trailer by January 2014. Defendant has not proffered reasons as to the delay in providing adequate space for the trailer in the License Area but has now, after attempting to move the trailer to Tower A, alleged for the first time that the

Agreement is limited to Tower C. This is not what plaintiff bargained for in the Agreement.

Defendant's contends that it has sole discretion to relocate the trailers. It cites to Section 2 of the Agreement, which states in part that plaintiff "shall perform the Services exclusively in a designated area at the Project Site to be determined by [defendant] in its sole discretion" and Section 4, which states in part that, "[plaintiff] shall perform the Services only on dates and times specified by [defendant]".

However, when Sections 2 and 4 are read in their entirety, defendant's contention is without merit. Section 2 also states that "the License Area, may, upon five (5) calendar days prior written notice to Licensee by Licensor, be relocated at any time." Section 4 defines the times that plaintiff will be able to perform the Services as "Designated Times". The section further states that the "Designated Times" are "Monday – Friday from 5:00a.m. to 3:00p.m" and that "[t]he Designated Times, may, upon five (5) calendar days prior written notice to Licensee from Licensor, be changed at any time." Defendant's argument that it had sole discretion to relocate the trailer is misleading. The Agreement provided that to relocate the trailer or to change the Designated Times, defendant had to give prior notice. Defendant does not allege that it gave prior notice. Hence, at this pleading stage, the court accepts plaintiff's allegations that the Agreement was breached

when its trailer was relocated in September 2014, March 2015, August 2015 and October 2015, forcing it to be unable to perform the Services under the Agreement.

Defendant's motion to dismiss plaintiff's claim for failing to move plaintiff's trailer to the License Area and relocating the trailer is denied.

Propane gas

Defendant argues that it was unable to provide plaintiff with propane gas because plaintiff failed to satisfy the condition precedent of obtaining the necessary permit. Defendant adduces to an email from plaintiff's counsel to defendant's counsel in which plaintiff's counsel request that the trailer be re-located as it had been unable to obtain a permit.

Subject to the standards of dismissal pursuant to CPLR 3211(a)(1), the letter is not sufficient documentary evidence to dismiss plaintiff's claim. In particular, the letter does not conclusively establish a defense to the asserted claims. See, Amsterdam Hospitality, 120 A.D.3d 431 (1st Dept 2014). Section 5 of the Agreement states in relevant part that "Licensee shall, at its sole cost and expense, obtain any and all federal, state and local approvals, permits and licenses necessary for the performance of the Services, including but not limited to a permit to operate kitchens and a food handler's license." Meanwhile, Section 8(iii) states that, "Licensor shall provide and maintain at no cost to Licensee all electricity, propane

gas and portable water necessary for Licensee's performance of the Services, as well as all necessary utility hook-ups, kiosk fit-outs and walkway roofing in the License Area."

Plaintiff's argument that the requirement as set forth in Section 5 does not include obtaining a permit for propane gas is unavailing. The section clearly states that the onus to obtain "any and all federal, states and local approvals, permits and licenses" falls on plaintiff. However, the letter adduced by defendant does not utterly refute plaintiff's claim. In particular, the letter does not conclusively establish that a permit was necessary. Moreover, plaintiff has argued that it was prevented from obtaining a permit because its trailer was relocated to Tower A, in breach of the Agreement.

Defendant's motion to dismiss plaintiff's claim for failure to provide propane gas is denied.

Serving kiosk

Defendant submits a rental order for a retail kitchen trailer as proof that they provided a serving kiosk, as agreed upon in Section 8(ii) of the Agreement. However, it is disputable that a retail kitchen trailer is a serving kiosk. In fact, plaintiff argues that it is not similar. Accordingly, defendant's evidence does not

meet the standard for dismissal on a CPLR 3211(a)(1) claim and cannot be dismissed.

Parking Spaces

Similarly, defendant proffers an email exchange between defendant's representative, Brian deLahunta, and plaintiff's representative, Maria Pacilla, where Mr. deLahunta offers to reimburse plaintiff for the two parking spaces and Ms. Pacilla accepts the offer. However, once again, there is no uncontroverted evidence that such reimbursement was tendered and therefore, without more, the email exchange does not conclusively establish a defense to the asserted claims, as warranted on a 3211(a)(1) motion.

Accordingly, defendant's motion to dismiss the claim regarding its alleged failure to provide parking spaces is denied.

Unauthorized Vendors

Finally, plaintiff avers in its complaint that defendant breached the Agreement by permitting unauthorized vendors to sell food and beverage on the Project Site. The Agreement provides in Section 8(i) that the "Licensee shall be the exclusive food and beverage provider on the Project Site during the term of the Agreement." Accepting plaintiff's factual allegations as true, and construing the

complaint in the light most favorable to plaintiff, the court cannot dismiss this allegation at this stage.

Accordingly, defendant's motion to dismiss the claim regarding unauthorized vendors on the Project Site is denied.

Second Cause of action for breach of implied covenant of good faith and fair dealing

A covenant of good faith and fair dealing is implied in every contract. Zurakov v Register.Com, Inc., 304 AD2d 176, 178 (1st Dept 2003]). A party to a contract breaches this covenant by "act[ing] in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." Id.

New York courts have repeatedly held that a claim for breach of the covenant of good faith and fair dealing will be dismissed as redundant when the conduct constituting the breach is also a violation of the express terms of the contract. See e.g., New York Univ. v Cont. Ins. Co., 87 NY2d 308, 320 (1995), Engelhard Corp. v Research Corp., 268 AD2d 358, 358–59 (1st Dept 2000).

Here, the conduct that plaintiff seeks to argue is a breach of good faith and fair dealing is also a violation of the express terms of the Agreement. For example, plaintiff argues that while defendant has the sole discretion to determine the

Therefore, defendant's motion to dismiss the second cause of action for breach of the implied covenant of good faith and fair dealing is granted

Accordingly, it is hereby

ORDERED that for all the reasons set forth above, defendant's motion to dismiss plaintiff complaint for breach of the Food License Service Agreement is denied; and it is further

ORDERED that defendant's motion to dismiss plaintiff's complaint for breach of the implied covenant of good faith and fair dealing is granted; and it is further

ORDERED that defendant shall answer the complaint within thirty days of today; and it is further

ORDERED that the parties shall appear for a conference in Part 45 60 Centre Street, Rm. 218 on December 1, 2016 at 2:30 pm.

Date: October 19, 2016
New York, New York

Anil C. Singh