

High Accessories, Inc. v Amazon.com DEDC, LLC

2016 NY Slip Op 32383(U)

November 29, 2016

Supreme Court, New York County

Docket Number: 652357/2016

Judge: Charles E. Ramos

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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HIGH ACCESSORIES, INC. d/b/a DEPECHE
MODE NY,

Index No.
652357/2016

Plaintiff,

- against-

AMAZON.COM DEDC, LLC, 7 WEST 34TH STREET
LLC and VORNADO REALTY TRUST,

Defendants.

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Hon. C. E. Ramos, J.S.C.:

In motion sequence 002, the defendants 7 West 34th Street LLC (7 West) and Vornado Realty Trust (Vornado, collectively, the Movants) move pursuant to CPLR 2221(a) and (d) to reargue this Court's prior order, entered on January 18, 2016, dismissing the first and second causes of action in the plaintiff High Accessories, Inc. d/b/a Depeche Mode NY's (High) complaint (the Order).

This action arises out of a landlord/tenant dispute involving a commercial space located at 7 West 34th Street, New York, New York (the Premises). High, the tenant, operates a showroom for wholesale and retail distribution of fashion goods. It commenced this action alleging breaches of its lease with 7 West, the landlord (the Lease). Vornado is the managing member of 7 West.

On November 9, 2015, this Court held oral argument on the Movants' motion for summary judgment to dismiss High's complaint.

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During oral argument the Court stated that the motion for summary judgment was "granted in all respects" (11/9/2015 tr., 15:22-25). Subsequently the Court entered an Order, dismissing the first and second causes of action only (NYSCEF #76). The Movants' instant motion seeks to have this Court amend the Order to dismiss the complaint in its entirety.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v Roche*, 68 AD2d 558, 567 [1st 1979]).

Summary judgment "should only be employed when there is no doubt as to the absence of triable issues" (*Martin v Briggs*, 235 AD2d 192, 196 [1st 1997]). "In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion" (*id.*). "The key to summary judgment resolution is issue-finding, rather than issue-determination" (*id.* [internal quotations omitted]).

The complaint asserts five causes of action for an injunction, unconscionable clause, breach of lease, loss of business, and unjust enrichment. In opposition to the Movants' motion for summary judgment, High submitted the affidavit of Charles Mans, the Chief Executive Officer of High (the Mans Affidavit).

As a preliminary matter, the complaint asserts all five causes of action against all of the defendants collectively, and fails to identify a specific defendant for any particular allegation. High does not allege any privity, contractual relationship, or specific conduct that would provide a basis for asserting any of the causes of action against Vornado, the managing member of 7 West. As a result, the complaint is dismissed as against Vornado.

High's first cause of action for injunctive relief and second cause of action seeking a declaration that the "termination clause" of the Lease is unconscionable are both premised on an alleged oral promise that High would be able to remain in the Premises.

High's first cause of action is dismissed because it fails to establish the requisite elements for injunctive relief. "The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

The allegations of High's complaint and the statements in the Mans Affidavit contain only general conclusory statements that are insufficient to defeat summary judgment (*DeCintio v. Lawrence Hosp.*, 33 AD3d 329, 329 [1st 2006]).

In its second cause of action, High fails to persuade this Court that the Lease's "termination clause" is unconscionable pursuant to RPL § 235-c, or that there is an ambiguity that would necessitate the consideration of parole evidence in interpreting the Lease.

High's fifth cause of action for unjust enrichment, which alleges that the defendants' enrichment "resulted in direct violation of the terms of the [Lease]" must be dismissed (Complaint, ¶ 78). "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]).

With respect to High's third cause of action for breach of contract, High fails to submit any evidence that would raise a triable issue with respect to the purported breaches of the Lease.

High's complaint contains only conclusory allegations that the Movants breached the Lease (Lester Aff., Ex. A, ¶¶ 32-50). In opposition to the Movants' motion for summary judgment, High submitted the Mans Affidavit, which fails to provide any other evidence to bolster its pleadings, but reiterates in conclusory fashion that numerous issues with the Premises exists. To create a genuine issue of fact, High must offer more than an affidavit containing only conclusory statements (*State Bank of India, N.Y.*

[* 5]
Branch v Patel, 167 AD2d 242, 243 [1990]).

In support of its motion for summary judgment the Movants submitted an affidavit from Twana T. Mack, the Vornado property manager of the Premises (the Mack Affidavit), which states that electronic system that tracks complaints related to the Premises only recorded relatively minor complaints that were resolved by Vornado. According to the Mack Affidavit, there were no complaints in the electronic system by High related to the issues described in the Mans Affidavit.

The Mans Affidavit does not state that High ever informed 7 West or Vornado of the issues it was experiencing or that 7 West or Vornado failed to respond to its complaints. Furthermore, the Mans Affidavit fails to identify any dates, times, or the duration of the purported issues.

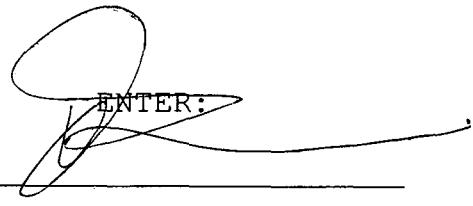
High has "failed in [its] burden to oppose summary judgment by laying bare his proof and demonstrating material issues of fact requiring a trial" (*Klapper v Wang Labs., Inc.*, 165 AD2d 693, 694 (1990)). Consequently, the Movants are entitled to summary judgment dismissing the complaint as against them. This Court grants the motion to reargue and upon reargument, the Court grants summary judgment to the Movants, thereby dismissing High's complaint in its entirety as against them.

Accordingly, it is

ORDERED that defendants 7 West 34th Street LLC and Vornado Realty Trust's motion for summary judgment is granted and the complaint is dismissed as against defendants 7 West 34th Street LLC and Vornado Realty Trust with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: November 29, 2016


ENTER:

J.S.C.

CHARLES E. RAMOS