Delta Galil USA v PPF Off Two Park Ave. Owner, LLC.
2016 NY Slip Op 32605(U)
December 20, 2016
Supreme Court, New York County
Docket Number: 650388/2016
Judge: Charles E. Ramos

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

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DELTA GALIL USA and COTY INC.,

Plaintiffs, Index No. 650388/2016

- against -

PPF OFF TWO PARK AVENUE OWNER, LLC.,

Defendant.

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

In motion sequence 001, plaintiffs Delta Galil USA ("Delta") and Coty Inc. ("Coty") move pursuant to CPLR 3212 for summary judgment against defendant PPF Off Two Park Avenue Owner, LLC ("Two Park") in the amount of $1,444,334.45, plus attorney's fees in an amount to be determined.

For the reasons set forth below, the Court grants the motion for summary judgment as to liability with respect to the first and fourth causes of action, and dismisses the second and third causes of action.

Background

On December 30, 2005, SEB Immobilien-Investment GmbH, Two Park's predecessor-in-interest, as the landlord, entered into a lease agreement with Coty (the "Lease Agreement"), regarding the premises on the seventeenth floor of the building located at Two Park Avenue, New York, New York (the "Premises") (Verified Complaint, ¶ 11). The Lease Agreement was later amended three times (*id.*). Section 6.3 of the Lease Agreement provides that:

> "(A) Landlord agrees that, in the event that any asbestos-containing materials ("ACM") shall be discovered in the Premises during the Term then, provided that such ACM shall not have been introduced into the Premises by Tenant or its agents, contractors or employees, Landlord shall abate any such ACM, including vinyl asbestos tiles, in accordance with the applicable Requirements, at Landlord's sole cost and expense...
>
> (B) Landlord shall restore any areas of the Premises that have been damaged by the ACM Abatement Work, and Fixed Rent shall abate during the period Tenant cannot and is not using the Premises or portion thereof because of Landlord's ACM Abatement Work in proportion to the area of the Premises not used by Tenant" (Affidavit of Weinstock ["Weinstock Aff."], Ex. C).

The Lease Agreement defines "Requirements" as "all present and future laws, rules, orders, ordinances, regulations, statutes, requirements, codes and executive orders..." (*id.* at Article 37).

On November 25, 2013, with consent of Two Park, Coty sublet the Premises to Delta pursuant to a sublease agreement (the "Sublease Agreement") (Verified Complaint, ¶ 14). On January 13, 2014, Two Park executed a written consent to the Sublease Agreement, which provides that Coty is contractually obligated to enforce the Lease Agreement against Two Park for the benefit of Delta (*id.* at ¶ 16; Weinstock Aff., Ex. D). According to the Lease Agreement, a tenant or subtenant must obtain Two Park's consent to perform construction work on the Premises (*see* Weinstock Aff., Ex. C, Article 3).

Delta and Coty advised Two Park that Delta wanted to perform certain construction work on the Premises, including installation of a new sheetrock ceiling (*id.* at ¶¶ 5, 7). According to the

testimony submitted by Delta and Coty, Two Park consented to the renovation of the Premises (Weinstock Aff., ¶ 12). Two Park does not dispute this showing.

Delta retained Petretti & Associates Construction Management ("Petretti") as a general contractor for the renovation (Verified Complaint, ¶ 17). During the renovation, Petretti's subcontractors discovered mastic in a portion of the ceiling, which was suspected to be ACM (*id.* at ¶ 19). The subcontractors stated that they could not proceed with the renovation without disturbing the ACM (Weinstock Aff., Ex. H, Ex. I, Ex. J, Ex, K). Coty notified Two Park of the discovery of ACM in the ceiling of the Premises (Verified Complaint, ¶ 3).

Hillmann Consulting LLC ("Hillmann"), an ACM specialist retained by Two Park, conducted an investigation of the ceiling mastic and confirmed the presence of ACM (*id.* at ¶ 20). Hillmann issued a written report, which stated that:

> "[t]he planned work may impact or otherwise disturb ACM and the removal of ACM must include consulting services (design and monitoring) and the removal should be performed by a New York licensed asbestos abatement contractor...
>
> If alterative work procedures are implemented that will not impact or otherwise disturb ACM, those materials may remain in place, as well as ACM in good condition" (Weinstock Aff., Ex. G, p. 1).

In August 2014, Coty, on Delta's behalf, requested that Two Park abate the ACM at the Premises pursuant to § 6.3(A) of the Lease Agreement, and requested a rent abatement for the period

during which the Premises could not be occupied pursuant to § 6.3(B) of the Lease Agreement (Verified Complaint, ¶ 22). Two Park rejected Coty's requests, and advised Delta that alternative work procedures could be implemented to avoid disturbing the ACM (Affidavit of Toro ["Toro Aff."], ¶¶ 14, 15). Two Park also provided to Delta a list of contractors who allegedly could perform the work without having to abate the ACM (*id.* at ¶ 15). According to the testimony submitted by Two Park, Delta refused to implement alternative work procedures or engage the contractors provided by Two Park to avoid disturbing the ACM (*id.* at ¶ 16)

In September 2014, Coty again requested that Two Park abate the ACM and acknowledge the rent abatement (Verified Complaint, ¶ 24). Two Park did not respond to the second request (*id.* at ¶ 25). On September 23, 2014, Coty, Delta, Petretti, Two Park and others scheduled a telephone conference to discuss the ACM at the Premises (*id.* at ¶ 26). In that call, Two Park reiterated that the ACM did not have to be disturbed or abated (Toro Aff., ¶ 17). Thereafter, Delta commenced this action, asserting claims for breach of the Lease Agreement and the implied covenant of good faith and fair dealing, and unjust enrichment (Verified Complaint, ¶¶ 31-57).

According to the affidavit submitted by Delta's principle, Delta performed the ACM abatement at an actual cost of $318,512

(Weinstock Aff., ¶ 24). Delta represents that it was unable to occupy the Premises during this time period due to the ACM, while Coty paid Two Park three months' rent in the amount of $469,326.99 (*id.* at ¶ 25). Delta also alleges that it incurred costs for the extension of the construction schedule in the amount of $115,426, and was paying additional rent for its existing space in the amount of $541,069.46 (*id.* at ¶¶ 26, 28). In addition, Delta seeks recovery of its attorney's fees, relying on § 38.13 of the Lease Agreement, which provides that:

> "In the event of any litigation between the parties relating to this Lease, the Premises, the Building or Property (including pretrial, trial, appellate, administrative, bankruptcy or insolvency proceeding), the prevailing party shall be entitled to recover its reasonable attorneys' fees, charges and disbursements as part of the judgment, award or settlement" (*id.* at Ex. C).

Discussion

Delta and Coty move for summary judgment on the grounds that there are no triable issues that Two Park is solely responsible for ACM abatement under the Lease Agreement and New York City Administrative Code. In the alternative, they argue that they are entitle to summary judgment for unjust enrichment in the amount of the actual cost to abate the ACM.

To obtain summary judgment, the movant shall sufficiently establish the cause of action or defense to warrant the court as a matter of law in directing judgment (CPLR 3212[b]). The opponent must show facts sufficient to require a trial of any

issue of fact to defeat a motion for summary judgment (*id.*).

The Lease Agreement obligates Two Park to abate ACM in connection with applicable code. New York City Local Law No. 76 of 1985 ("Local Law 76") requires "abatement or encapsulation of asbestos that may be disturbed during building renovations" (*see Chemical Bank v Stahl*, 272 AD2d 1, 16 [1st Dept 2000]). Local Law 76 was enacted in response to the increasing awareness of the dangers of friable asbestos in large buildings (*see MRI Broadway Rental v United States Mineral Prods. Co.*, 242 AD2d 440, 440 [1st Dept 1997]). In addition, the landlord's responsibility for ACM abatement cannot be shifted to the tenant even if the work could have been performed in a less burdensome or inexpensive manner (*see Solow Avon Prods.*, 301 AD2d 441 [1st Dept 2003]).

As a matter of law this Court concludes that Two Park is contractually obligated to abate the ACM on the Premises to comply with the applicable Requirements, including Local Law 76. Two Park does not raise a triable issue because it consented to Delta's renovation of the Premises nor did it reject Delta's construction plan. According to Hillmann, the ACM specialist retained by Two Park, Delta's planned renovation could impact or otherwise disturb the ACM on the Premises. In addition, during the renovation, Delta's subcontractors refused to proceed with the work until the ACM was abated. Two Park has failed to fulfill its obligation under the Lease Agreement by refusing to abate the

ACM being disturbed during the consented renovation on the Premises.

Therefore, Delta and Coty have established that Two Park breached § 6.3 (A) and (B) of the Lease Agreement and is entitled to summary judgment on its first and fourth causes of action for breach of the Lease Agreement. The second and third causes of action for unjust enrichment and breach of covenant are dismissed as duplicative.

Accordingly, it is

ORDERED that the motion for summary judgment is granted as to liability with respect to the first and fourth causes of action, and the second and third causes of action are hereby severed and dismissed; and

ORDERED that the issue of calculating the amount of damages, including the cost of ACM abatement and the rent abatement, the entitlement of the costs due to the delay of renovation, the additional rent paid by Delta, and the amount of reasonable attorney's fees incurred in this action are hereby referred to a Special Referee to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that counsel for the plaintiffs shall, within 30

days from the date of this order, serve a copy of this order with notice of entry, upon the Special Referee Clerk in Rm. 119 at 60 Centre Street, who is directed to place this matter on the Special Referee's calendar for the earliest convenient date.

Dated: December 20, 2016

ENTER:

J.S.C.
CHARLES E. RAMOS