

2001 Commerce St. Corp. v Motiva Enters., LLC

2016 NY Slip Op 33133(U)

January 22, 2016

Supreme Court, Westchester County

Docket Number: 63555/2015

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

FILED
AND
ENTERED

ON _____ 2016
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
2001 COMMERCE STREET CORP.,

Plaintiff,

-against-

MOTIVA ENTERPRISES, LLC and NY DEALERS
STATIONS, LLC

Defendants.
-----X

ECKER, J.

DECISION & ORDER
INDEX NO. 63555/2015

Motion Seq. #2
Motion Date: 12/11/15

The following papers numbered 1 through 7 were read on the motion by Motiva Enterprises, LLC ("Motiva"), made pursuant to CPLR 3211(a)(1), seeking dismissal of the complaint of 2001 Commerce Street Corp. ("plaintiff") as against Motiva:

PAPERS

NUMBERED

Notice of Motion/Elliot Affidavit/Hedrick
Affidavit/Exhibit A/Memorandum of Law
Geller Affidavit/Steeneck Affidavit/
Exhibit 1/Memorandum of Law ¹

1 - 4

5 - 7

The dispute *sub judice* involves the former relationship between plaintiff as landlord and Motiva as tenant, of premises used as a gas station, in Yorktown, New York. NY

¹ The parties are advised that working copies provided to the court must include copies of all exhibits and the pleadings.

Dealers Stations, Inc. ("NY Dealers") was the subtenant of Motiva. Plaintiff and Motiva executed a General Release Agreement ["the Release"], dated November 28, 2014, in contemplation of Motiva's, and NY Dealers vacating the leased premises upon expiration of the lease term on November 30, 2014. The signatories to the Release were Motiva, Henry R. Steeneck, Peggy J. Steeneck and plaintiff. The complaint alleges that the defendants damaged and removed plaintiff's equipment and appurtenances, including the gasoline pumps, causing it to sustain \$70,000 in damages. NY Dealer Station has interposed an Answer. Motiva has made this pre-answer motion to dismiss.

The Release provided, *inter alia*, that Motiva would leave behind two underground tanks it owned, in exchange for a release from liability as to any and all claims that might otherwise have been asserted against Motiva by plaintiff, and plaintiff against Motiva. The only condition precedent to the effectiveness of the Release was the execution of a Bill of Sale for the two underground tanks from Motiva to plaintiff, which apparently was delivered, in that there is no indication to the contrary by either party.

The Release, a 14 page document, 5 of which contained substantive terms agreed upon by the parties, provided in ¶ 3[a] the defined length of time as to which claims were to be released, namely "for the use and occupancy of real property...**whether known or unknown in any manner that have been asserted or could have been asserted from the beginning of the world.**" (Emphasis added).

The scope of the Release, i.e., the items to be included as released, are defined with specificity in ¶ 3[b], as to claims and obligations arising out of "...Motiva's operation of the Service Station (including operation by persons under contract with Motiva)...".

There is no limiting language as to claims “that have been asserted or could have been asserted” in this subparagraph as is contained in the bold language of ¶ 3[a], in ¶ 3[c] or ¶ 3[d]. Rather, in ¶ 3[d], the last sentence provides “**(I)t is the intention of the Parties that this Agreement results in the full and final release of Motiva as to all Claims and Obligations relating to the Lease and Service Station.**” (Emphasis added).

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence submitted by the movant utterly refutes the plaintiff’s allegations against it and conclusively establishes a defense as a matter of law. *Cog-Net Bldg. Corp. v. Travelers Indem. Co.*, 86 AD3d 585 [2d Dept 2011]. Furthermore, in considering a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] , citing *Morone v Morone*, 50 NY2d 481 [1980] and *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976].

In accordance with this rule, the court undertakes its examination of the parties’ submissions in support and in opposition to defendant’s motion to dismiss, as well as the specific language of the Release. Motiva avers that the intent of the parties was to release it from all claims, now and forever, effective the date of the Release, subject only to the delivery of the Bill of Sale for the two underground tanks. Plaintiff avers that it could not have intended to release Motiva from claims “whether known or unknown”, in that there was no way in which it could have been aware of a claim for property damage, other than involving the underground tanks, until NY Dealers, the subtenant, vacated the premises.

The Release is dated as of November 28, 2014. Henry Steenick, in his affidavit in opposition, at ¶16, states that Thanksgiving fell on November 27th, and that on November 28th or 29th, he received a call that the premises were being vandalized by the departing tenant. He then went to the premises and observed that the departing tenant was removing the gasoline dispensers which plaintiff owned, and that he discovered additional damage which he believed was deliberately done. In ¶17 he states none of the damage done to the premises by the departing subtenant existed while the release was being negotiated. In ¶12, Steenick states that during the negotiations of the Release, there was no discussion that it would run to claims other than those that were related to the underground tanks. Steenick's affidavit is consistent with that of his present attorney, Kenneth Geller, who in his affidavit confirms that his discussions with Reesa Hedrick, plaintiff's attorney, leading to the execution of the Release, did not include the Release running to future claims that might arise from use and occupancy of the premises.

Defendant has submitted the affidavit of Motiva's principal Bruce Elliot, who claims that the Release was "in exchange for a full and complete release of all claims, without limitation" [Elliot Aff., ¶ 7], and the affidavit of Reesa Hedrick, who represents that as the attorney for Motiva, she negotiated the Release with Geller, with the understanding the Release "covered past, present and future events." [Hedrick Aff. ¶ 6].

The Release was signed by Henry Steeneck, on his own behalf, on November 24, 2014 in Connecticut, Bruce Elliot, on behalf of Motiva, on November 26, 2014, in Texas, Peggy Steeneck, on her own behalf, on November 24, 2014, in Florida, and Henry Steeneck again, as president of plaintiff, on December 2, 2014, in New York, with the notary being Mike Ferdinand, qualified in Bronx County. It is noteworthy that Henry

Steeneck, who in his affidavit, *supra*, represented that he observed the premises being vandalized and the gasoline dispensers removed after having received a phone call on November 28th or 29th, did not sign or acknowledge his signature, as president of plaintiff, until December 4th, which appears to have been after he discovered the conditions at the premises.

Given the inconsistency of the language within the document itself, as evidenced by the bold language highlighted by the court, *supra*, combined with the disparate factual assertions of the parties, and then applying the applicable law when considering the motion to dismiss on the pleadings, the court determines that the motion must be denied. Further, parol evidence may be required in this case to determine the intention of the parties, as was recognized in *Burnside 711 LLC v Amerada Hess Corporation*, 109 AD3d 860 [2d Dept 2013], a case involving the interpretation of releases relative to environmental claims and a motion to dismiss based upon documentary evidence [CPLR 3211(a)(1)]. In reversing the trial court, and finding issues of fact that would require application of the parol evidence rule to assist the trier of fact in evincing the intent of the parties, the Court observed “[t]he meaning and extent of a release ‘necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given’” (internal citations omitted). A general release may not be construed to cover matters that the parties ‘did not intend to dispose of’ (internal citations omitted).” *Id.* at 861.

Based upon the foregoing, defendant’s motion to dismiss pursuant to CPLR 3211 (a)(1) based upon documentary evidence is denied.

The parties are directed to appear before the Preliminary Conference Part of the Westchester County Supreme Court, Room 811 on February 22, 2016.

Dated: White Plains, New York
January 22, 2016

ENTER



HON. LAWRENCE H. ECKER, J.S.C.

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