455 Dumont Assoc., LLC v Rule Realty Corp.
2016 NY Slip Op 33235(U)
October 26, 2016
Supreme Court, Kings County
Docket Number: Index No. 506860/14
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of October, 2016.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

----------X

455 DUMONT ASSOCIATES, LLC,

Plaintiff,

- against -

RULE REALTY CORP.,

Defendant.

----------X

DECISION, ORDER AND JUDGMENT

Index No. 506860/14

Motion Sequence No. 5

The following papers numbered 1 to 6 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	6
Affidavits (Affirmations)	
Other Papers	

Upon the foregoing papers, defendant Rule Realty Corp. moves for an order, pursuant to CPLR 3212, granting it summary judgment: (1) dismissing the complaint of plaintiff 455 Dumont Associates, LLC; and (2) on its Fifth Counterclaim declaring that plaintiff has no legal interest in the property known as 455 Dumont Avenue in Brooklyn.

Background

Plaintiff commenced the instant action by electronically filing a summons and

complaint in the Kings County Clerk's Office on or about July 25, 2014 together with a notice of pendency. Plaintiff seeks, in essence, a judgment declaring both that defendant was not entitled to terminate a commercial lease of the subject premises and that plaintiff is entitled to exercise a written option to purchase the subject real property. Defendant owns the subject property, and plaintiff was defendant's commercial tenant at all relevant times. On or about September 9, 2014, defendant interposed an answer containing counterclaims. The fifth counterclaim, which seeks a judgment declaring that plaintiff has no legally cognizable interest in the subject premises, is relevant here.

The lease agreement, dated October 4, 2004, a standard store lease[1] with riders, provides for a lease term of eleven years, which ended on September 30, 2015. Three provisions of the lease agreement are implicated in the present dispute. First, the agreement required plaintiff to maintain insurance coverage providing no less than two million dollars in coverage for any accident on the premises; the same clause required plaintiff to forward copies of the policy documents and proof of premium payments to defendant. Second, the lease agreement contained a written option that plaintiff could exercise and thereby purchase the property for $900,000 within 90 days of the lease's expiration. Lastly, the lease agreement contained both a standard lease no-waiver provision and a clause which allowed defendant owner to terminate the lease in the event of plaintiff's default.

---

[1]Promulgated by the Real Estate Board of New York Inc.

The landlord-tenant relationship between the parties was generally unremarkable from 2004-2011. In January, 2005, plaintiff sublet the entire premises to Family Dollar Stores of New York Inc. Exhibit D to plaintiff's opposition is a stipulation settling an eviction action in 2011 brought by the owner for rent arrears. Before the matter was settled, the owner obtained a default judgment and warrant of eviction, which was executed and plaintiff them moved to open its default, which resulted in the settlement and plaintiff was restored to possession. By letter dated January 3, 2014, defendant notified plaintiff that it was in default pursuant to the lease agreement; specifically, defendant pointed out that plaintiff 1) had not demonstrated compliance with the insurance coverage requirements, and 2) owed $11,521 for real estate taxes despite several bills. Plaintiff did not cure the default to defendant's satisfaction, and additional correspondence ensued, on January 23, 2014 and February 22, 2014 from defendant, listing additional breaches of the lease. Defendant insisted that it would terminate the lease if the defaults were not cured. According to defendant, the default regarding the insurance was not cured during the applicable period, and, finally, defendant issued a letter, dated April 30, 2014, terminating the lease because of the insurance requirement and sidewalk repairs which defendant claimed were needed and plaintiff failed to perform.

This action ensued. It was commenced on July 25, 2014. A Note of Issue has not been filed as yet. Defendant served and filed the instant summary judgment motion on

March 17, 2016. It was adjourned several times and argued on June 9, 2016. Decision was reserved.

Arguments In Support Of Motion

(1)

In support of its motion for summary judgment, defendant first alleges that, consistent with prevailing appellate authority, the failure of a commercial tenant (here, plaintiff) to comply with a lease provision requiring the tenant to maintain insurance coverage constitutes a material breach of a commercial lease agreement. Defendant asserts that there is no serious dispute in this case that plaintiff failed to procure the insurance coverage as required by the lease agreement. Defendant concludes that such a breach justified its termination of the lease.

Defendant claims that plaintiff is attempting to obfuscate the relevant facts by asserting that the subtenant maintained insurance coverage. Defendant argues that, notwithstanding this contention, the lease agreement does not contain terms that allowed plaintiff to delegate its obligation to procure insurance. Additionally, defendant claims that the lease required plaintiff to forward all policy documents and premium payment receipts to defendant and states that plaintiff failed to do so. In sum, defendant maintains that plaintiff breached multiple provisions in the lease agreement that were related to plaintiff's obligation to procure and maintain insurance.

(2)

Defendant also contends that plaintiff is disingenuously arguing that other provisions of the lease agreement prohibit defendant from terminating the lease. Specifically, defendant maintains that the relevant language, allowing it to purchase insurance in the event of plaintiff's default, is permissive; therefore, defendant continues, that language does not constitute a waiver of plaintiff's obligation to maintain insurance coverage. To the contrary, defendant continues, the lease explicitly permitted defendant to both give plaintiff five days to cure a noticed default and to terminate the lease with three days' notice—which is what defendant did in this case.

(3)

Lastly, defendant contends that plaintiff's allegations of bad faith lack merit. Defendant reiterates that the subject agreement required plaintiff to maintain specified insurance coverage and that plaintiff is presently alleging that defendant acted in bad faith in an attempt to justify its failure to comply with the lease obligations. Defendant accuses plaintiff of simply ignoring its obligations during the cure period, and points out that the record contains no evidence that the cure period was tolled. In any event, defendant continues, the lease was validly terminated and plaintiff is thus not entitled to possession of the subject premises. Finally, defendant acknowledges that discovery is not complete in this action; nevertheless, defendant reasons that summary judgment is appropriate because material facts (such as the terms of the lease agreement and plaintiff's failure to obtain the required insurance coverage) are not seriously disputed. Defendant asserts that the issue of

whether it was entitled to terminate the lease is a purely legal one and can be determined as a matter of law. For these reasons, defendant concludes that it is entitled to summary judgment both dismissing the complaint and declaring that plaintiff has no property interest in the subject premises.

Opposition Arguments

(1)

Plaintiff first argues that the motion should be denied because defendant waived several insurance-coverage obligations. Specifically, plaintiff asserts that for years before the instant dispute arose, defendant accepted proof of insurance coverage obtained by plaintiff's subtenant without complaint. Moreover, plaintiff notes that the subject sublease agreement was made among defendant, plaintiff and the subtenant, and that the sublease agreement contains defendant's representation that plaintiff was not in default under the master lease on the date the sublease was signed in early 2005. Thus, plaintiff reasons, the owner's representation constitutes defendant's written waiver of plaintiff's purported failure to obtain the required insurance coverage. Indeed, plaintiff continues, in 2011 the parties had a rent dispute and resolved it, yet defendant did not raise any allegations then concerning insurance coverage. Plaintiff concludes that even though the lease agreement contains a nonwaiver clause, relevant appellate authority suggests that defendant's conduct (including years of accepting rent payments without comment) has resulted in a waiver of any insurance procurement requirement contained in the lease agreement.

(2)

Alternatively, plaintiff maintains that defendant should be estopped from asserting its present arguments. Plaintiff claims that it relied upon defendant's representation in the sublease agreement, and, consequently, reasonably concluded that it was not in default of any applicable master lease provision. Because that reliance has since proved detrimental, plaintiff reasons that defendant should thus be estopped from now asserting plaintiff's alleged default. Also in the alternative, plaintiff asserts that a trier of fact should decide the issue of whether the alleged insurance procurement default is a material breach of the lease agreement. Plaintiff claims that if an alleged breach of contract is not material, the contract nevertheless remains in force. Here, plaintiff contends that defendant's purported termination of the lease agreement was ineffective, and plaintiff should still be entitled to exercise its option to purchase the subject property.

Moreover, plaintiff maintains that defendant has, since 2014, breached the covenant of good faith and fair dealing implied in the lease agreement. Plaintiff claims, without any evidence in support, that it agreed to pay a rent that was higher than market value in exchange for the option to purchase the subject property. Plaintiff then reiterates that it had a largely unremarkable landlord/tenant relationship with defendant until 2014. Plaintiff reasons that defendant is attempting to reap a windfall—as defendant has accepted above-market rent payments from plaintiff for years, but then, near the expiration of the lease agreement, decided to find an excuse to terminate the lease (and, consequently, cancel plaintiff's option to purchase the subject premises for a favorable price). Also, plaintiff

contends that the applicable lease agreement provisions expressly mention the relevant remedy (other than termination of the lease) for an alleged breach; in the case of plaintiff's failure to procure the required insurance coverage, defendant had the right to purchase insurance and bill plaintiff for the expense as additional rent. Plaintiff suggests that this, and not termination of the lease, should be the sole enforceable remedy for the alleged breach of the insurance procurement provision. Furthermore, plaintiff claims that this contention is bolstered by the fact that the remedy for failure to procure insurance is stated on a rider and not the main boilerplate pages. Plaintiff concludes that these additional reasons are sufficient to deny the instant motion.

(3)

Lastly, plaintiff raises other some arguments. Plaintiff maintains that in the event that the terms of the lease agreement are ambiguous and require interpretation, this court must read those terms against the interests of defendant, which prepared the relevant documents. Plaintiff also alleges that this court should construe the lease agreement in a manner most favorable to plaintiff, the commercial tenant. Similarly, plaintiff claims that principles of real property common law require this court to read the subject lease agreement in a manner that avoids a forfeiture of an otherwise enforceable property interest: namely, plaintiff's purchase option. Moreover, plaintiff continues, this court should reject the defendant's conclusion that the lease was properly terminated because plaintiff did not seek an injunction from the court after the dispute began but before defendant purportedly terminated the lease. Plaintiff adds that any alleged breach of the lease agreement was

inconsequential to defendant, and, therefore, plaintiff's option to purchase the property should not be terminated. Finally, plaintiff urges this court to deny the instant motion as premature because discovery remains outstanding. For these reasons, plaintiff concludes that the instant motion should be denied.

Discussion

(1)

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a summary judgment motion will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material factual issues (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

Proponents of a motion for summary judgment must first demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med.*

Ctr., 64 NY2d 851, 853 [1985]). If this burden is met, the court must evaluate whether the issues of fact alleged by the opponent are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment (*Spodek v Park Property Dev. Assocs.*, 263 AD2d 478 [2d Dept 1999]). "[A]verments merely stating conclusions, of fact or of law, are insufficient [to] defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily decided (*Andre*, 35 NY2d at 364).

(2)

Turning to the subject commercial lease agreement, appellate authority recognizes that "[a] lease is a contract" (*Genovese Drug Stores, Inc. v William Floyd Plaza*, LLC, 63 AD3d 1102, 1103 [2d Dept 2009]; *see also Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Furthermore, "[w]here the terms of a contract are clear and unambiguous, the contract must be enforced according to its terms" (*Genovese Drug Stores, Inc.*, 63 AD3d at 1103-1104; *see also Greenfield v Philles Records*, 98 NY2d 562, 569 [2002] ["a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms"]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

"[C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Vermont Teddy Bear Co., Inc.*, 1 NY3d at 475 [internal quotation marks omitted]). "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed" (*Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] [internal quotation marks omitted]).

(3)

Here, paragraph 43 of the rider to the lease agreement, as amended by "Amendment to lease" also signed on October 4, 2004, states, among other things at ¶ 10, that plaintiff shall maintain no less than Two Million Dollars' worth of insurance coverage for any one accident, and One Million Dollars "in respect to injuries to any one person." Property damage insurance of at least $500,000 is required. The provision at ¶ 43 of the Rider also requires plaintiff to deposit insurance documents (i.e., premium payment receipts and policy documents) with defendant. It is undisputed[2] that plaintiff failed to comply with this provision; accordingly, plaintiff breached the lease agreement.

Plaintiff's argument that there was no material breach lacks merit. First, and contrary to plaintiff's contentions, the breach of an insurance procurement provision in a commercial lease agreement is in fact a material default (*Jackson 37 Co., LLC v Laumat, LLC*, 31 AD3d 609, 610 [2d Dept 2006]; *see also C & N Camera & Elecs. v Farmore Realty*, 178 AD2d

---

[2] The court also notes that the copies of the certificates of insurance provided to defendant by plaintiff either do not provide for coverage in the requisite amounts or do not indicate that the subject premises are insured, or both.

310, 311 [1st Dept 1991]). Notwithstanding plaintiff's arguments, this type of default is not de minimis, but is instead "a material breach justifying termination of the lease" (*166 Enters. Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154, 158 [1st Dept 2011]; *see also C & N Camera & Elecs.*, 178 AD2d 310). Indeed, it is "an incurable violation" for a commercial tenant to allow a landlord to remain unprotected "against the unknown universe of any claims arising during the period of no insurance coverage" (*Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528, 529 [1st Dept 2009]). Also contrary to plaintiff's allegations, it is immaterial if plaintiff's subtenant had obtained applicable insurance coverage, because the defendant "landlord [was] not required to accept subtenant's performance in lieu of tenant's" (*Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 77 AD3d 573, 574 [1st Dept 2010]). Additionally, plaintiff's argument that defendant was restricted in its choice of remedies and required to purchase the insurance also lacks merit (*166 Enters. Corp.*, 81 AD3d at 158 [landlord was not "required to exercise its option under the lease of obtaining its own insurance and billing it to Tenant as additional rent"]; *see also Jackson 37 Co., LLC*, 31 AD3d at 610). Accordingly, in light of the plaintiff's material breach of the commercial lease agreement, defendant's notice of termination was valid (*see e.g. 166 Enters. Corp.*, 81 AD3d at 159). The court notes that the owner doesn't raise the issue of the sidewalk repairs or the real estate taxes in the motion, so presumably the other items in defendant's default letter were cured.

(4)

Plaintiff's waiver argument also lacks merit. Paragraph 24 of the lease agreement is a standard provision entitled "No Waiver" and explicitly asserts that defendant's failure to insist on plaintiff's strict performance under the agreement shall not constitute a waiver of defendant's right to later insist on compliance. This type of provision is enforceable, and, accordingly, "the clause should be enforced to preclude a finding of waiver" (*Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]).

The court notes that plaintiff, after receiving defendant's January 3, 2014 default letter, endeavored to obtain the required insurance coverage (albeit with a policy that did not name defendant as an additional insured, as required by the lease agreement) and forwarded the certificate of insurance to defendant. Upon receiving the next default letter from defendant, which points out that the owner is not named thereon, plaintiff had the owner added as a named insured but the coverage amounts were not in compliance with the lease and the leased premises are not identified as the covered premises. Further, the certificate states "TBA" for policy number, implying that the policy had not yet been issued. These actions on plaintiff's part are inconsistent with plaintiff's present argument that defendant waived the insurance requirement. It is further noted that the lease at ¶ 43 states "such policies are to be written by good and solvent insurance companies satisfactory to the landlord," while the document plaintiff provided to cure the default (defendant Exhibit J) states (whether or not true) "the insurer named herein (Tudor Insurance Company) is not

licensed by the State of New York, not subject to its supervision , and in the event of the insolvency of the insurer, not protected by the New York State Security Funds."

Similarly, this court rejects plaintiff's argument alleging that defendant breached the implied covenant of good faith and fair dealing. To be sure, "[t]he duty of good faith and fair dealing is implicit in the performance of contractual obligations" (*Banc of Am. Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 243 [1st Dept 2007]; *see also Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). However, and contrary to plaintiff's contentions, bad faith is generally found where one party to a contract frustrates the ability of the other contracting party to perform obligations (*see e.g. Id.* at 244 [defendant failed to approve building renovation plans in an attempt to extract six million dollar payment from defendant and "clearly implicates [defendant's] bad faith nonperformance of its obligations under the lease"). Here, there is no indication that defendant attempted to prevent plaintiff from obtaining insurance; indeed, plaintiff ultimately did obtain insurance coverage (although not in compliance with the obligations imposed by the subject lease agreement). Instead, the record simply indicates that plaintiff failed to obtain the requisite insurance, which constitutes a material breach of the lease agreement (*see e.g. Jackson 37 Co., LLC*, 31 AD3d at 610). Lastly, given that the record indicates that plaintiff failed to comply with the insurance procurement provision, no additional discovery is necessary for this court to properly interpret the lease agreement; the contention that the instant motion is premature thus lacks merit (*see e.g. AFA Protective Sys., Inc. v Orange Regional Med. Ctr.*, 128 AD3d 869, 890 [2d Dept 2015]).

Accordingly, it is

ORDERED AND ADJUDGED that defendant Rule Realty Corp.'s summary judgment motion, Sequence No. 5, is granted, and the complaint of plaintiff 455 Dumont Associates, LLC is dismissed; and it is further

ORDERED, ADJUDGED AND DECLARED, pursuant to Article 15 of the Real Property Actions and Proceedings Law, that plaintiff has no enforceable property interest[3] in the premises known as 455 Dumont Avenue in Brooklyn, New York; and it is further

ORDERED AND ADJUDGED that the Clerk of the County of Kings is hereby directed to cancel and discharge of record the notice of pendency filed in this action on July 25, 2014 against the Property known as 455 Dumont Avenue in Brooklyn, New York, identified on the tax map of Kings County as Block 3780, Lot 44, and said Clerk is hereby directed to enter upon the margin of record of same a notice of cancellation referring to this order and judgment.

The foregoing constitutes the decision, order and judgment of the court.

FILED
KINGS COUNTY CLERK
2016 NOV -7 AM 9:25

E N T E R,

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court

NANCY T. SUNSHINE
Clerk

[3] Including, but not limited to an option to purchase the subject property at a predetermined price.

At an I.A.S. Trial Term, Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 19th day of May 2016

P R E S E N T :
Hon. Silber
Justice

455 Dumont Associates, LLC
Plaintiff(s)

Cal. No. 50
Index No. 506860/14

- against -

Rule Realty ~~Corp~~ Corp.

Defendant(s)

The following papers numbered 1 to read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	
Answering Affidavit (Affirmation)	
Reply Affidavit (Affirmation)	
____ Affidavit (Affirmation)	
Pleadings - Exhibits	
Stipulations - Minutes	
Filed Papers	

(1) The motion is adjourned to ~~August~~ June 9, 2016

(2) Reply papers, if any, to be e-filed by June 6, 2016

For Clerks use only
MG___
MD___
Motion Seq. #

E N T E R

____
J.S.C.

EJV-rev 11-04

[illegible] for Berkman

For Wenig Saltiel [illegible]

At an I.A.S. Trial Term, Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 7th day of April 2016

P R E S E N T :
Hon. Debra Silber
Justice

455 Dumont Associates LLC
Plaintiff(s)

Cal. No. 54
Index No. 506850/14

- against -

Rule Realty Corp.
Defendant(s)

The following papers numbered 1 to read on this motion **Papers Numbered**

Notice of Motion - Order to Show Cause
and Affidavits (Affirmations) Annexed
Answering Affidavit (Affirmation)
Reply Affidavit (Affirmation)
Affidavit (Affirmation)
Pleadings - Exhibits
Stipulations - Minutes
Filed Papers

The parties stipulate to adjournment of Defendant's motion for summary judgment to 7/19/16.

Plaintiff by Berkman Law Office

Defendant Wenig Saltiel LLP.
By Leslie Perez-Bonnie

For Clerks use only
MG
MD
Motion Seq. #

ENTER

J.S.C.

EJV-rev 11-04