AMC Professional Realty Corp. v Glass
2017 NY Slip Op 33095(U)
July 20, 2017
Supreme Court, Kings County
Docket Number: 2002/16
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.

KINGS COUNTY CLERK
FILED
2018 JUL 31 AM 7:54

At a Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 20th day of July, 2018.

PRESENT: HON. DEBRA SILBER
JUSTICE, SUPREME COURT

---X

AMC PROFESSIONAL REALTY CORPORATION,

Plaintiff,

-against-

DAVID M. GLASS, M.D.,

Defendant.

---X

DECISION AFTER TRIAL

Index No. 2002/16

This is an action brought by a landlord against a former tenant regarding a commercial lease for a medical office in Brooklyn, New York. The complaint sets forth a single cause of action, for breach of contract, that is, of the lease between the landlord, AMC Professional Realty Corporation, and their former tenant, David M. Glass, M.D.

Plaintiff alleges that the defendant David M. Glass, M.D. breached the lease when the defendant vacated the premises before March 31, 2020, the end of the lease term, and seeks a money judgment for the rent for the period from when defendant vacated, September 30, 2016, to the date the plaintiff re-rented the premises. Defendant has asserted numerous affirmative defenses in his answer, including surrender - - that defendant was released from any obligation under the lease by plaintiff, and that plaintiff failed to mitigate the damages alleged in the complaint, despite

having had the opportunity and means of doing so. Defendant has also asserted a counterclaim for damages and attorneys' fees.

A bench trial was held on July 5, 2018. Plaintiff called one witness, Dr. Mitchell Seidman, Vice President of AMC Professional Realty Corporation. Defendant David M. Glass, M.D. testified on his own behalf and did not call any other witnesses. Numerous exhibits were admitted without objection and on consent. Both parties were represented by counsel.

FINDINGS OF FACT

The plaintiff AMC Professional Realty Corporation is a company run by Dr. Mitchell Seidman and his wife. Dr. Seidman serves as the corporation's vice president and his wife, Mrs. Seidman, serves as the corporation's president. Defendant David M. Glass M.D. is a former tenant of AMC Professional Realty Corporation. Defendant was a long-time tenant of the second floor at 2989 Ocean Parkway. At some point, Dr. Seidman moved into the medical office below Dr. Glass' office. Dr. Seidman is an ophthalmologist.

Dr. Glass began his tenancy at 2989 Ocean Parkway in 1989. At that time, Dr. Glass was a board certified vascular surgeon. The instant dispute arises from the written commercial lease agreement Dr. Glass entered into with AMC Professional Realty Corporation for the period April 1, 2007 to March 31, 2010, which was extended from April 1, 2010 to March 31, 2015 and was again extended from April 1, 2015 to March 31, 2020.

Shortly after signing the extension agreement that covered the period April 1, 2015 to March 31, 2020 (Exhibit 4), Dr. Glass was arrested. According to Dr. Glass, he was innocent, and blamed the crime on one of his employees, but accepted a plea deal and a restitution agreement to avoid incarceration.

Dr. Seidman learned about Dr. Glass's arrest on the TV news and in the newspapers. Dr. Glass assured Dr. Seidman that he would stay as long as he could in the office. When he couldn't earn a living from his medical practice any longer and had to surrender his medical license due to his conviction, Dr. Glass put up a "For Rent" sign. Dr. Glass contacted a broker to find a doctor to "take over" his lease. Vadim Atbashyan, a local realtor employed by Commercial Acquisitions Realty Services, brought Dr. Victor Katz to look at the office. Dr. Katz was impressed by the space, including the renovations and the surgical center that Dr. Glass had installed during his tenancy. Dr. Glass informed Dr. Katz of the terms of the lease he had with AMC Professional Realty Corporation, and informed Dr. Seidman in mid - September of 2015 that he had found someone to replace him as the tenant. As Dr. Glass' lease permitted assignment, provided the landlord approved, Dr. Glass forwarded the items specified in the 2007 lease (¶ 49), incorporated into the 2015 renewal, to Dr. Seidman, including Dr. Katz' financial statement. All of Dr. Glass' conduct was in conformity with a request to assign the lease.

Shortly thereafter, Commercial Acquisitions Realty Services provided terms for the proposed lease agreement to Dr. Katz (defendant's Exhibit A). From this "deal

sheet,"[1] It was clearly not to be an assignment of Dr. Glass' April 2015 lease, but an entirely new lease at a significantly increased rent. According to defendant's Exhibit A, printed on the broker's stationary, there was to be an increase in the monthly rent from $3,450 to $3,800, (which includes one parking space for the tenant's car in the lot) an annual increase in the rent of 3%, which was not in Dr. Glass' lease, and a provision that the tenant would pay 50% of any increases of the real estate taxes imposed on the building over the taxes for the 2015-16 fiscal year, also a term not in Dr. Glass' lease. Additionally, and most telling, it states that the landlord, not Dr. Glass, would pay the broker one months' rent of $3,800 if the lease was signed.

Around the same time, according to the defendant's testimony, Dr. Seidman told Dr. Glass that once Dr. Glass handed over his keys to the premises, he could go on his way without worrying about the lease. A short time after that, Dr. Glass sat with Mrs. Seidman as she drafted a "Lease Cancellation and Termination Agreement" (Plaintiff's Exhibit 5). Mrs. Seidman apparently worked on the agreement along with Leo Saltzman, a lawyer for AMC Professional Realty Corporation. Included in the otherwise standard agreement for terminating a commercial lease is a clause, that provides as follows:

> Section 4. (iii) Cancellation of this Lease Agreement is subject to performance of the following condition: The signing of a new lease with Victor Katz, M.D. and receipt of a security deposit from Victor Katz, M.D. by October 1, 2015.

Dr. Glass did not retain counsel to review the agreement that Mrs. Seidman had drafted. These parties have been sharing office space for almost thirty years. Mrs.

[1] It is dated September 21, 2014, but this is clearly a typographical error, as it references Dr. Victor Katz' proposed leasing of the premises.

Seidman apparently is an attorney as well as Dr. Seidman's office manager and the president of AMC Professional Realty Corporation. Dr. Glass testified that he did not realize when he signed it that the clause making Dr. Katz's tenancy a condition to the termination of his agreement was included in the document, titled "Lease Cancellation and Termination Agreement." He signed the agreement, dated September 24, 2015, thinking it terminated his lease and he turned his keys over to Dr. Seidman.[2] The cancellation agreement states at paragraph 3 "The term of the Lease shall expire and shall be deemed terminated and cancelled effective on September 30, 2015." It also provided that Dr. Glass' security deposit would be applied to the September 2015 rent.

Dr. Katz, after receiving the proposed terms for the lease agreement provided by the broker, informed Dr. Seidman that he had found another office that was "a better fit" for his practice. Plaintiff began advertising the premises and found a new tenant, Dr. Binder, who moved into the office on May 15, 2016, according to Dr. Seidman's testimony. The lease was not introduced into evidence to support plaintiff's claim that the premises had been rented as of that date.

Plaintiff hired counsel and commenced this suit on February 3, 2016. In plaintiff's complaint, the plaintiff claims that the defendant breached the lease agreement and the lease extension agreement, and that he owes plaintiff the unpaid rent from September 1, 2015 to March 31, 2020, totaling $198,000. The plaintiff also claims that the defendant is obligated to pay plaintiff's attorneys' fees associated with the suit. At trial,

[2] The agreement was then amended, effective September 28, 2015, to have Dr. Katz's date to sign the lease "on or about October 1, 2015" instead of "by October 1, 2015." Both parties signed the amendment (Plaintiff's Exhibit 5).

plaintiff orally amended the ad damnum to seek rent from September 1, 2015 to May 15, 2016, plus counsel fees. Defendant acknowledged that he did not pay plaintiff for September 2015, but pointed out that the rent security was to be applied to that months' rent, as stated in the Termination Agreement. He claims he surrendered the lease and was led to believe that Dr. Katz would be permitted to assume his lease on the same terms, that is, $3,300 per month, with no added rent, and $150 per month if the tenant wanted a reserved parking space, as Dr. Glass did, but the lease did not require this $150 fee if the tenant did not want the parking spot. Dr. Glass claimed that he provided plaintiff with a new tenant and plaintiff thwarted his ability to assign the lease to Dr. Katz.

CONCLUSIONS OF LAW

Breach of Contract

To prevail on a breach of contract claim, plaintiff must "demonstrate that it sustained 'actual damages as a natural and probable consequence" of the defendant's breach (*Rakylar v Washington Mut. Bank*, 51 AD3d 995, 996, [2d Dept 2008]; *see also Ross v Sherman*, 95 AD3d 1100 [2d Dept 2012]).

Here, plaintiff AMC Professional Realty Corporation has failed to make a prima facie case with regard to its sole cause of action for breach of contract. While it is true that the loss of Dr. Glass' medical license and subsequent vacatur of the premises was a breach, plaintiff has failed to prove that its damages were a "natural and probably consequence." The evidence and credible testimony adduced at trial instead demonstrated that the plaintiff incurred damages not as a consequence of the

defendant's breach, but because plaintiff refused to permit Dr. Glass to assign the lease, proffered a written lease cancellation agreement which Dr. Glass signed, took the keys from Dr. Glass and then sought to enter into a new lease agreement with Dr. Katz on terms which were different and costlier than the terms in the lease plaintiff had with defendant.

At trial, Dr. Seidman testified that it was Dr. Katz who wanted different terms in the lease and that he "accommodated him." When questioned further about the increased monthly rent, the annual increases, and the real estate tax charges, Dr. Seidman suggested that Vadim Atbashyan, the broker, created the deal sheet and that he had "no idea" where the information or changed terms came from. The court finds Dr. Seidman's testimony on this point was simply not credible. It is unlikely that Dr. Katz asked to pay more rent than Dr. Glass was obligated to pay under his lease, which wasn't to expire for four more years, or that Dr. Katz. would have requested that the lease have a "Good-Guy" guaranty for him to sign, never mind obligating him to pay real estate taxes and cost of living adjustments which were not in Dr. Glass' lease. It is also notable that Dr. Seidman (AMC) did not call either the broker or Dr. Katz as a witness. The clear inference is that the terms were proposed by Dr. Seidman, not the broker hired by Dr. Glass or by Dr. Katz.

Further, Dr. Seidman did not satisfactorily explain why AMC did not simply draft an assignment of the defendant's lease to Dr. Katz, with a place for AMC's signature consenting to the assignment. When Dr. Seidman was asked why he did not prepare an assignment, he said something to the effect that he didn't think Dr. Glass would be able to pay the rent if Dr. Katz did not do so. This was not a reasonable response. The court

can only infer that plaintiff sought to seize on the opportunity to make a sizable profit from Dr. Katz, partly as a result of Dr. Glass' misfortune, and partly due to Dr. Glass' considerable and costly improvements to the office, and that Dr. Seidman did not appreciate the consequences of his conduct. It is understandable that a board-certified doctor such as Dr. Katz would be unwilling to share a two-office medical building with Dr. Seidman after learning of Dr. Seidman's intent to raise the rent so significantly only a few months after he had signed the lease extension agreement with Dr. Glass.

Defendant, for his part, acted in good faith when he sought out a tenant to take over his lease. Pursuant to the provisions in the lease and extension agreement regarding a proposed lease assignment, defendant sought a financial statement from Dr. Katz and facilitated contact between Dr. Katz and Dr. Seidman. The defendant had no way to know that the plaintiff would propose to enter into an entirely separate and new agreement with Dr. Katz with different terms. To hold the defendant responsible for seven and a half months of rent (after deducting the security deposit), in light of Dr. Seidman's clear sabotage of Dr. Glass' request for an assignment and assumption of his lease, would be unjust and inequitable.

Moreover, the evidence and testimony make it clear that there was a valid surrender and termination of the lease, not when defendant signed the "Lease Cancellation and Termination Agreement" and handed over the keys to Dr. Seidman and Dr. Seidman took them and counter-signed the Termination Agreement, because of the condition therein that Dr. Katz rent the space, even if Dr. Glass did not realize this provision was in the document, but by operation of law. A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord

and tenant relationship that it indicates their intent to deem the lease terminated. This is a determination which must be made on the facts and is inferred from the conduct of the parties. (See *Riverside Research Institute v KMGA, Inc,* 68 NY2d 689 [1986[]).

The clear evidence here has shown that the tenant had to abandon the lease as he lost his medical license, but sought permission to assign the lease to another doctor, but landlord's conduct "indicated its intent to terminate the lease and use the premises for its own benefit." (See *Deer Hills Hardware, Inc. v Conlin Realty Corp.,* 292 AD2d 565 [2d Dept 2002]). This released Dr. Glass from any obligation to pay rent after September 30, 2015. Applying his rent security to the September rent, as the Termination Agreement states the landlord would do, he does not owe any further rent to the landlord and the complaint must be dismissed.

Defendant's Counterclaim

The defendant argues that he is entitled to $75,000 with interest for improvements and renovations he made to the space which he claims greatly increased the value of the plaintiff's rental space, and for personal property that he left behind. The defendant also seeks payment of his attorneys' fees.

The lease agreement (plaintiff's Exhibit 3) which was extended in March of 2015, for the term commencing April 1, 2015, states:

> LICENSES & PERMITS: 37 (d). all renovations, rebuildings, and additions to be installed or erected in the demised premises, shall be deemed to be and immediately become part of the realty and the property of the Landlord, and shall be deemed to be part of the demised premises unless Landlord directs Tenant to remove them at the end of or the early termination of the lease.

At trial, the defendant acknowledged that he was not entitled to be compensated for the improvements, as they were affixed to the premises, but he claimed he was entitled to be compensated for personal property he left behind, including a copy machine, a television, and other such items. However, the defendant provided absolutely no evidence of the value of these items of personal property, nor did the defendant provide any evidence to demonstrate that he was barred by the plaintiff from entering the premises to remove these items before he gave plaintiff the keys. The lease cancellation agreement [at 4 (iv)] has the standard language, which specifically provides that any personal property left behind will be deemed abandoned. Thus, the counterclaim must be dismissed.

ATTORNEYS' FEES

The 2007 lease (plaintiff's Exhibit 1) is a standard Real Estate Board of New York office lease. It contains, at paragraph 19, a provision that the tenant will be liable for landlord's attorneys' fees if landlord incurs them due to tenant's default. As the court holds herein that the lease was surrendered by operation of law, and no rent was due after September 30, 2015, plaintiff is not entitled to recover its attorneys' fees.

Defendant's counterclaim also seeks attorneys' fees. His application for attorneys' fees is denied. A review of Paragraph 19 of this commercial lease reveals an allowance for the recovery of attorneys' fees for the landlord; there is no such clause in favor of the tenant. In a commercial lease situation, a reciprocal requirement for attorneys' fees will not be implied for the benefit of the tenant as is done in a residential lease situation pursuant to RPL 234. (*See* Landlord and Tenant Practice in New York,

Volume G § 15:643; *Gracie Tower Realty Associates v Danos Floral Co.*, 142 Misc 2d 920 [Civ. Ct. New York 1989]).

CONCLUSION

For the reasons stated above, the complaint is dismissed, and defendant's counterclaim is dismissed. Neither party is entitled to attorneys' fees.

This shall constitute the decision and order of the court.

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court

KINGS COUNTY CLERK
FILED
2018 JUL 31 AM