Adjuva LLC v Williamsburg 39 LLC
2018 NY Slip Op 32777(U)
October 4, 2018
Supreme Court, Kings County
Docket Number: 508114/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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ADJUVA LLC and SHELLCO INC.,

Plaintiffs, Decision and order

- against - Index No. 508114/18

mS # 2

WILLIAMSBURG 39 LLC, FABRIZIO FERRI and INDUSTRIA SUPERSTUDIO OVERSEAS, INC.,

Defendants, October 4, 2018

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PRESENT: HON. LEON RUCHELSMAN

The defendant Industria Superstudio Overseas Inc., has moved seeking to dismiss the complaint on the grounds it fails to state a cause of action. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in a prior order, on May 1, 2012 the plaintiff tenant entered into a lease with defendant landlord concerning the rental of real property located at 29 South 5th Street in Kings County. The owner served a thirty-day notice to cure on March 19, 2018 and again on March 27, 2018 alleging various defaults. The plaintiff instituted this lawsuit and asserted causes of action against Industria another tenant in the building alleging that they interfered with the business relations of the plaintiff by recklessly engaging in construction and by

conspiring with the landlord to harm their business prospects. This motion to dismiss has now been filed by Industria.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR 3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

The second cause of action and the first cause of action that relates to Industria asserts that Industria engaged in construction in a reckless manner that harmed the plaintiff. Industria seeks to dismiss that cause of action on the grounds there is no privity between Industria and the plaintiff.

However, it is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the plaintiff can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Whether Industria owed a duty to the plaintiff in its construction endeavors will surely be explored during discovery. It is surely true that if Industria owed no duty to the plaintiff then the plaintiff cannot maintain a cause of action. The scope of Industria's duty, if any, must be explored through discovery and a possible trial. However, at this stage of the proceedings, the plaintiff has asserted a viable cause of action.

Concerning the next cause of action, the plaintiff asserts Industria conspired with the landlord to drive the plaintiff out of business, essentially a claim for tortious interference with business relations. It is well settled that to establish a claim for tortious interference with business relations, the plaintiff must demonstrate that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper (Tri-Star Lighting Corp., v. Goldstein, 151 AD3d 1102, 58 NYS3d 448 [2d Dept., 2017]. Further, the complaint must establish the defendant acted out of malice, a necessary

requirement (Kenneth H. Brown & Co., Inc., v. Dutchess Works et., al, 73 AD3d 984, 904 NYS2d 75 [2d Dept., 2010]). Of course, the plaintiff will be required to prove all the elements of this cause of action, however, at this juncture, considering all the facts in the complaint as true, the plaintiff has satisfied its burden. Consequently, the motion seeking to dismiss this cause of action is denied.

Turning to the motion to reargue, the defendant asserts the court overlooked certain information when it granted the plaintiff's Yellowstone application.

A motion to reargue which is not based upon new proof or evidence may be granted upon the showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision (Delcrete Corp. v. Kling, 67 AD2d 1099, 415 NYS2d 148 [4th Dept., 1979]). Thus, the party must demonstrate that the judge must have overlooked some point of law or fact and consequently made a decision in error. Its purpose is designed to afford an opportunity to establish that the court overlooked or misapprehended relevant facts or misapplied a controlling principle of law. The motion cannot be made after the time for appealing the prior order has expired (Millson v. Arnot Reality Corp., 266 AD2d 918, 697 NYS2d 435 [4th Dept., 1999]). Thus, where a party fails to demonstrate

that the Court misapprehended any of the relevant facts or misapplied any controlling principle of law, a motion to reargue must be denied Matter of Mattie M. v. Administration for Children's Services, 48 AD3d 392, 851 NYS2d 236 [2d Dept., 2008], McNamara v. Rockland County Patrolmen's Benevolent Association, Inc., 302 AD2d 435, 754 NYS2d 900 [2d Dept., 2003]).

The defendant landlord argues that despite the court affording the plaintiff an additional thirty days in which to demonstrate insurance coverage the plaintiff has not provided sufficient evidence of insurance. The plaintiff shall be afforded ten days from receipt of this order in which to present all necessary evidence demonstrating insurance coverage. The failure to do so can only be indicative of the plaintiff's inability to do so rendering the Yellowstone inapplicable.

Turning to the issue of a sublet of the premises, the court held there was insufficient evidence of the existence of such sublet at the premises. However, the landlord should be given an opportunity to conduct discovery in this regard and if such sublet exists contrary to the lease then such Yellowstone application would be revisited. Therefore, the motion seeking reargument is granted to the extent the parties may engage in discovery concerning the issue of a sublet at the premises.

The last issue concerns the court's determination the plaintiff failed to close the ALT-1 application because of a stop work order. In seeking reargument the landlord points to an e-mail which purports to establish the plaintiff admitted the stop work order did not affect the ALT-1 application. However, the email is too vague to firmly reach such a conclusion. Again, the parties can engage in discovery concerning the ALT-1 application and as with the sublet may revisit the issue following discovery. The reargument is granted to that extent.

So ordered.

ENTER:

DATED: October 4, 2018
Brooklyn NY

Hon. Leon Ruchelsman
JSC