

Plaza Madison LLC v L.K. Bennett U.S.A., Inc.
2018 NY Slip Op 33023(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 652226/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. ARTHUR F. ENGORON

PART

IAS MOTION 37EFM

Justice

PLAZA MADISON LLC

Plaintiff,

- v -

L.K. BENNETT U.S.A., INC.,

Defendant.

INDEX NO. 652226/2018MOTION DATE 06/19/2018MOTION SEQ. NO. 001**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to

DISMISS

Upon the foregoing documents, defendant's motion to dismiss is denied.

Background

In this action, plaintiff, Plaza Madison LLC ("Plaintiff"), present owner of 655 Madison Avenue, New York, New York (the "Building"), sues to recover damages for the alleged anticipatory repudiation of the contractual obligation of defendant, L.K. Bennett U.S.A., Inc. ("Defendant"), to attorn to Plaintiff pursuant to an attornment provision in a master lease agreement that was incorporated into the sublease agreement to which Defendant is a party.

The parties agree on the following core facts. In 2006, Plaintiff leased retail space in the Building (the "Premises") to non-party Jones Retail Corporation d/b/a Anne Klein New York pursuant to a lease agreement dated February 15, 2006, the term of which is set to expire on November 30, 2018 (the "Master Lease"). On January 14, 2015, non-party Nine West Holding, Inc. ("Nine West"), as successor-in-interest to JAG Footwear, Accessories and Retail Corporation (formerly known as Jones Retail Corporation), subleased the Premises to Defendant pursuant to a sublease agreement, the term of which is set to expire on November 29, 2018 (the "Sublease"). Following the Sublease, Nine West and Plaintiff entered into an agreement of consent dated January 2015, whereby Plaintiff consented to the Sublease (the "Consent Agreement"; collectively, the "Contract Documents"). Although the Consent Agreement was between Plaintiff and Nine West, Defendant signed the Consent Agreement, acknowledging that Defendant had received a copy of the Contract Documents, and that Defendant had read, understood and accepted each of the Contract Documents.

Pursuant to an attornment provision contained in the Master Lease, the Contract Documents require Defendant to attorn to and recognize Plaintiff as its landlord upon the Master Lease's termination. The Master Lease, at Section 53, provides in pertinent part as follows:

- (r) Each sublease of the demised premises shall be deemed to contain the following provisions, whether or not specifically included therein:
 - (1) In the event of a default under any underlying lease of all or any portion of the premises demised hereby which results in the termination of such lease, or if the lessor under any such underlying lease shall exercise any right to cancel or terminate such underlying lease, the subtenant hereunder shall, at the option of the lessor under any such lease, attorn to and recognize such lessor as Landlord hereunder and shall, promptly upon such lessor's request, execute and deliver all instruments necessary or appropriate to confirm such attornment and recognition. The subtenant hereunder hereby waives all rights under present or future law to elect, by reason of the termination of such underlying lease, to terminate this sublease or surrender possession of the premises demised hereby...

The Sublease, at Article 5, provides *inter alia*:

- 5.1. This Sublease is in all respects subject and subordinate to the terms and conditions of the [Master] Lease... Notwithstanding anything to the contrary contained in this Sublease... this Sublease shall terminate and the Term shall expire without further notice in the event that the [Master] Lease is terminated for any reason...
- 5.2. Except as otherwise expressly provided in, or otherwise inconsistent with, this Sublease, the terms, provisions, covenants, stipulations, conditions, rights, obligations, remedies and agreements contained in the [Master] Lease are incorporated in this Sublease by reference...

The Consent Agreement provides *inter alia*:

- 3. The [Sublease] shall be subject and subordinate to the [Master] Lease in all respects, and if there is any conflict between the [Sublease] and the [Master] Lease, the [Master] Lease shall control.
- 4. Nothing contained herein or in the [Sublease] shall be deemed to create privity of contract between [Plaintiff] and [Defendant].

On or about April 6, 2018, the parties were informed that Nine West had filed Chapter 11 Bankruptcy and had made a motion in the bankruptcy proceeding to retroactively reject the Master Lease, including the Sublease. Thereafter, a dispute arose between the parties as to whether the attornment provision contained in the Master Lease required Defendant to attorn to

Plaintiff. In fact, shortly after Nine West notified the parties of its motion to reject the Master Lease, Defendant's representative contacted Plaintiff, claiming that Nine West's bankruptcy filing terminated the Sublease and further demanded that Plaintiff permit Defendant to remain in occupancy of the Premises for the remainder of the Sublease term for a fraction of the rent due each month; otherwise Defendant intended to vacate the Premises. On April 20, 2018, Plaintiff delivered a notice to Defendant, as required by the Master Lease, informing Defendant of its obligation to attorn to and recognize Plaintiff as its landlord. On April 27, 2018, counsel for Defendant responded to Plaintiff's notice of attornment, arguing that: (1) Nine West's bankruptcy filing, and rejection of the Master Lease, terminated any sublease which derived from the Master Lease; (2) Article 5 of the Sublease specifically provides that the Sublease shall terminate in the event the Master Lease is terminated for any reason; and (3) there was no subordination-attornment agreement between the parties, meaning there was no privity of contract between them. On May 7, 2018, the bankruptcy court granted Nine West's motion to reject the Master Lease. On or about May 16, 2018, Defendant vacated the Premises without paying the rent due for the months of April and May.

The Complaint

The complaint, filed on May 8, 2018, asserts two causes of action: a declaratory judgment pursuant to CPLR 3001 (first cause of action), and anticipatory repudiation/anticipatory breach of contract (second cause of action), and seeks a judgment against Defendant on the second cause of action in an amount to be determined at trial, but not less than \$1,036,083.31, together with pre-judgment interest therefrom from April 6, 2018 and attorneys' fees.

Defendant now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint on the ground that the complaint fails to state a cause of action and on the ground that documentary evidence proves that the breach of contract action cannot be maintained by Plaintiff as the parties are not in privity of contract. Defendant argues that pursuant to Bankruptcy Code § 365(h)(1)(i), the Sublease was terminated upon the rejection of the Master Lease. Defendant further argues that the complaint must be dismissed because the Consent Agreement makes clear that no privity of contract exists between the parties.

Plaintiff opposes the motion upon the grounds that: (1) pursuant to Section 53(r)(1) of the Master Lease, which was incorporated into the Sublease by reference pursuant to Article 5 of the Sublease, Defendant has no defenses to this action, as Defendant waived its right under present or future law to terminate the Sublease or vacate the Premises in the event the Master Lease is terminated; and (2) Section 53(r)(1) of the Master Lease created privity of contract between Plaintiff and Defendant.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) (“[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law”). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting

the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, *supra*, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) (“[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus” in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties “notice” of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

In view of the forgoing, the documentary evidence – i.e., the clear and unambiguous terms of the Contract Documents – does not establish a defense to the asserted claims. At the outset, contrary to Defendant’s contention that the bankruptcy court’s order granting Nine West’s motion to reject the Master Lease terminated the Sublease, pursuant to Section 53(r)(1) of the Master Lease, as incorporated by Article 5 of the Sublease, Defendant waived its right to elect, by reason of the termination of the Master Lease, to terminate the Sublease or vacate the Premises. Thus, § 365(h)(1)(i) of the Bankruptcy Code does not apply, as Defendant waived its right to terminate the Sublease in the instant situation. Furthermore, contrary to Defendant’s argument that pursuant to the Consent Agreement, privity of contract does not exist, the Consent Agreement excludes the Master Lease, which created privity, from the “no privity clause”; Section 53(r)(1) of the Master Lease created privity of contract between the parties upon Plaintiff’s exercise of its option to require attornment. Defendant is bound by the terms of the Master Lease as the Sublease was made expressly subject and subordinate to the terms of the Master Lease and the Sublease incorporated the Master Lease by reference; therefore, the Sublease was deemed to contain Section 53(r)(1) of the Master Lease by reference. Additionally, Defendant signed the Consent Agreement, thereby acknowledging that Defendant had accepted the Contract Documents. Although a conflict exists between the Sublease and the Master Lease as to whether the Sublease would terminate if the Master Lease was terminated for any reason pursuant to Article 5 of the Sublease, the Consent Agreement makes clear that the terms of the Master Lease shall control when there is a conflict between the Sublease and the Master Lease. Thus, the language found in Article 5 of the Sublease permitting termination of the Sublease upon termination of the Master Lease for any reason does not apply.

Furthermore, the complaint sufficiently pleads causes of action for a declaratory judgment and anticipatory repudiation. In the matter of the first cause of action for declaratory judgment, a justiciable controversy exists between the parties as to whether Section 53(r)(1) of the Master Lease is applicable. CPLR 3001 (“The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.”). The allegations in the complaint, Defendant’s motion papers, and the correspondence between the parties attached as exhibits, illustrate that a genuine dispute exists between the parties as to Defendant’s obligation to attorn to Plaintiff under Article 53(r)(1) of the Master Lease.

As to Plaintiff’s second cause of action for anticipatory repudiation, the complaint sufficiently pleads this cause of action. To sustain a cause of action sounding in anticipatory repudiation, “there must be [among other things] some express and absolute refusal to perform, or some

voluntary act on the part of the individual which renders it impossible for him [or her] to perform.” Palmetto Partners, L.P. v AJW Qualified Partners, LLC, 83 AD3d 804, 807 (2nd Dept 2011) (quoting Ga Nun v Palmer, 202 NY 483, 489 (1911)). “A party to a contract becomes liable for anticipatory breach when repudiating the agreement by disavowing the contractual obligations before performance is due.” BT Triple Crown Merger Co. v Citigroup Global Markets Inc., 19 Misc. 3d 1129(A), *3 (New York County 2008). On April 20, 2018, Plaintiff served Defendant with a notice of attornment, notifying Defendant that Plaintiff exercised its option to require attornment pursuant to Section 53(r)(1) of the Master Lease, and that upon termination of the Master Lease, Defendant was required to attorn to Plaintiff as its landlord. On April 27, 2018, Defendant denied any obligation to attorn to Plaintiff as landlord. Therefore, Defendant disavowed its obligation to attorn to Plaintiff as landlord before its performance came due under Article 53(r)(1) of the Master Lease. The documentary evidence submitted by the parties only supports this finding.

Conclusion

Motion to dismiss the complaint is denied. Defendants answer to the complaint to be served within thirty days of today. This matter is scheduled for a preliminary conference on January 25th 2019 at 10 a.m., Part 37, 60 Center Street, Room 418, New York, New York.

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<u>11/26/2018</u>			
DATE		ARTHUR F. ENGoron, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☒ DENIED	☐ SUBMIT ORDER	
	☐ SETTLE ORDER	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		