

Pacific Alliance USA, Inc. v 1450 Broadway, LLC

2019 NY Slip Op 30883(U)

April 4, 2019

Supreme Court, New York County

Docket Number: 654296/2013

Judge: Anthony Cannataro

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANTHONY CANNATARO PART IAS MOTION 41EFM

Justice

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INDEX NO. 654296/2013

PACIFIC ALLIANCE USA, INC.

MOTION DATE 01/06/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

1450 BROADWAY, LLC,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 79, 80, 81

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

In this commercial landlord-tenant action, plaintiff Pacific Alliance USA (“tenant”) moves for summary judgment on its sole cause of action for breach of contract against defendant 1450 Broadway, LLC (“landlord”) and seeks a money judgment in the sum of \$168,000 for a cost-of-work payment. Plaintiff also moves to dismiss landlord’s counterclaim for attorneys’ fees. The defendant landlord cross-moves for leave to amend or conform its answer to include a general denial and for an order granting summary judgment dismissing plaintiff’s complaint and awarding attorneys’ fees.

In December 2002, the predecessors in interest to both tenant and landlord entered into a ten-year lease for certain floors of the building located at 1450 Broadway. The lease was modified on several occasions and assigned to new entities with landlord eventually becoming tenant’s contractual counterparty with all rights and obligations created under the lease. The lease remained in full force and effect until its expiration

on December 31, 2012. The parties now dispute certain terms of the lease, including Article 70 which relates to cost-of-work payments and Article 39 which relates to electric charges. The parties also contest the effect of an estoppel certificate signed by tenant in 2010 at the request of a prior owner.

Article 70 of the lease states that tenant is responsible for paying up front for renovations to the premises and that landlord is to reimburse tenant for a portion of the cost of this work if the lease remained in full force and effect at each of four specified dates. Tenant performed renovations in accordance with the lease. Tenant also satisfied the terms and conditions for, and received, the first three cost-of-work payments. Landlord was obligated to make the final payment of \$168,000 if the lease remained in full force and effect and the tenant was not in default on the expiration date of the lease, December 31, 2012.

In 2010, plaintiff signed, at the request of the prior owner, an estoppel certificate addressed to the prior owner's mortgagor, UBS Real Estate Securities, Inc. Paragraph 7 of the estoppel certificate states that "Tenant has deposited with Landlord security or other deposits in the amount of \$175,000.00." Paragraph 12 of the estoppel certificate provides that "[a]ll reimbursements, allowances, and other concessions (including free rent and credits) due to Tenant under the Lease have been received by Tenant."

On August 19, 2013 tenant emailed landlord seeking return of its security deposit and the final cost-of-work payment. On August 21, 2013 landlord responded that it was holding \$153,938.47 of the security deposit after applying \$21,061.53 to outstanding electric charges. Plaintiff approved of the reduction of the security deposit and a check was issued on October 29, 2013 reflecting this agreement. However, landlord rejected tenant's several requests for the final cost-of-work payment citing the estoppel certificate. On December 13, 2013, tenant commenced the instant action alleging that

landlord breached its obligation under the lease to make the final cost-of-work payment.

Tenant argues that, because the lease remained in full force and effect through December 31, 2012, it satisfied all conditions to earn the final cost-of-work payment and is therefore entitled to summary judgment on its breach of contract claim. Tenant further asserts that the landlord cannot rely on the estoppel certificate to claim that the cost-of-work payments are not due because (i) the estoppel certificate was executed in favor of a third party and not the landlord; (ii) the estoppel certificate was executed in 2010 and represented only that tenant had no outstanding claims under the lease at that time; and (iii) landlord cannot allege justifiable or actual reliance on the estoppel certificate given that entitlement to the cost-of-work payment was an express term of the lease for which landlord had actual written notice. Finally, in response to defendant's cross-motion, tenant claims that even if landlord is permitted to amend its complaint, landlord's general denial defense fails as tenant was not in default of the lease at the time it expired.

Landlord argues that tenant is not entitled to the final cost-of work payment or summary judgment on its breach of contract claim because tenant waived its right to the cost-of-work payment by executing the 2010 estoppel certificate which failed to mention the outstanding cost-of-work liability. Landlord asserts that it could reasonably rely on the estoppel certificate given that it was provided on behalf of landlord's successor-in-interest, a prior owner, and it did, in fact, rely upon it.

Landlord argues the should the court not award summary judgment based on the estoppel certificate, then landlord should be permitted to conform or amend its answer to plead a general denial to tenant's allegations that it was not in default at the date of expiration of the lease. Landlord asserts that pursuant to this newly amended

answer, summary judgment should be granted in its favor because tenant was actually in default with respect to electric charges that were admittedly outstanding.

Taking first landlord's cross-motion for leave to conform or amend its answer to include a general denial to tenant's allegations that it was not in default of the lease, "[leave] to amend pleadings is freely given, absent a showing of prejudice or surprise" (*Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009]). Where there is no showing of prejudice or surprise resulting from delay in asserting new claims or defenses, it is proper to conform the complaint to the proof under CPLR 3025 (c) (*id.*). Further, it has been held that as "a summary judgment motion is the procedural equivalent of a trial, this court has the discretion to invoke the provisions of CPLR 3025 (c) and permit the pleadings to be deemed amended to conform to the evidence" (*Bd. of Managers of Mews at N. Hills Condominium v Farajzadeh*, 185 Misc 2d 353, 355 [NY Dist Ct 2000], *affd as mod sub nom. Bd. of Managers of the Mews at N. Hills Condominium v Farajzadeh*, 189 Misc 2d 38 [App Term 2001]).

Here, landlord seeks to conform its answer and add a general denial. A general denial would allow landlord to assert that tenant was in default at the time of the expiration of the lease for failure to timely pay electric charges. Allowing defendants to include that defense would not prejudice plaintiffs, who were aware they had to comply with the lease to recover their cost-of-work payments and that this was an issue to be litigated. Accordingly, the branch of defendants' motion to amend the pleadings to conform them to the evidence is granted, and the proposed answer attached to their motion papers is deemed the answer in this action.

The Court next addresses both parties' motions for summary judgment. "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]). Once the proponent has met this showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*).

Relying on the newly asserted general denial defense and the exhibits in support, landlord alleges that it is entitled to summary judgment because tenant cannot prove entitlement to the cost-of-work payments as it was in default of the lease for failure to timely pay electric charges. Landlord asserts that electric charges are due by the first day of each calendar month pursuant to Article 39 of the lease. Landlord appears to rely on Article 39 (D) which requires rent to be paid “monthly in advance on the first day of each calendar month.” However, this provision is only applicable “[f]rom and after the Commencement Date and continuing through and including the day immediately preceding the date of the installation of any submeter(s).” Article 39, in fact, requires landlord to furnish electric supply to tenant and pay the charges directly. Tenant is then required to pay landlord, as additional rent, for its metered usage and administrative fee “on demand made from time to time but no more frequently than monthly.” Landlord does not allege any facts that show tenant owed electric charges at the date of the expiration of the lease. That these charges became due after the expiration of the lease cannot be used to prevent tenant from earning its cost-of-work payment, especially given that the electric charges were paid upon request. Accordingly, landlord’s motion for summary judgment based on tenant’s non-compliance with the lease is denied.

The Court now turns to landlord’s defenses to tenant’s motion for summary judgment, each of which relate to landlord’s claim that the 2010 estoppel certificate, which did not mention the outstanding cost-of-work payment, now prevents tenant from claiming entitlement to the payment. Estoppel is an equitable remedy imposed by

law to prevent enforcing rights that “would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party’s word or conduct, has been misled into acting upon the belief that such enforcement would not be sought” (*Nassau Tr. Co. v Montrose Concrete Products Corp.*, 56 NY2d 175, 184 [1982]).

Landlord has failed to demonstrate that the estoppel certificate should prevent the enforcement of tenant’s right to the cost-of-work payment for the following reasons. First, landlord was not a party to the estoppel certificate, rather it was executed by tenant and addressed to a third-party lender at the request of the prior landlord. Certificates executed in favor of the lender cannot “be used to estop the tenant from asserting its rights as against the landlord” (*Padell Nadell Fine Weinberger & Co. v Midtown Realty Co.*, 245 AD2d 188, 189 [1st Dept 1997]; *see also 116 Madison St., LLC v Seid*, 25 Misc 3d 1207[A] [Civ Ct 2009], *affd*, 28 Misc 3d 131[A] [App Term 2010]).

Second, tenant did not waive future rights or claims by failing to specifically mention them as outstanding at the time the estoppel certificate was executed in 2010. The fact the security deposit is specifically referenced in the estoppel certificate does not manifest an intent to waive all other future payment rights under a lease. The execution of an estoppel certificate stating that tenant had no outstanding claims against landlord at that time “should not be read as a blanket release insulating liability for obligations otherwise shown to be due under the lease” (*1689 First Ave., Inc. v Zhifeng Zheng*, 25 Misc 3d 24, 26 [App Term 2009]). Rather, waiver requires “voluntary and intentional abandonment of a known right” (*Nassau* at 184).

Third, landlord could not justifiably rely on the estoppel certificate. As landlord had means available of acquiring knowledge of the true facts about existing claims under the lease at the time it purchased the building, landlord cannot claim that he justifiably relied on a misrepresentation by tenant about outstanding cost-of-work

claims (see *World of Food, Inc. v New York World's Fair 1964-1965 Corp.*, 22 AD2d 278, 281 [1st Dept 1964]). The estoppel certificate itself references the fact that the lease was in full force and effect and had not been amended except as outlined. The lease itself includes Article 70 (*supra*), which outlines the terms under which tenant would be entitled to the cost-of-work payments. If landlord found a discrepancy between these documents, reasonable due diligence would have resolved the issue. For the above reasons, each of landlord's defenses necessarily fail.

Finally, landlord's counterclaim for attorneys' fees is dismissed as this Court has not found tenant to be in default of the lease. Accordingly, it is

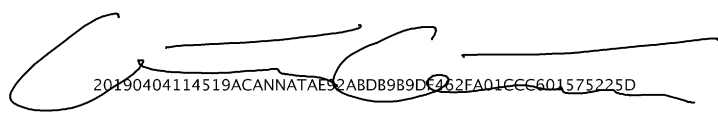
ORDERED that defendant's motion to conform its answer to include a "general denial" defense is granted, and the proposed answer is deemed to be served and filed; and it is further

ORDERED that plaintiff's motion for summary judgment on its sole cause of action against defendant is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$168,000, together with interest at the rate of 9% per annum from the date of January 1, 2013 until the date of the decision and order on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendant's cross-motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant's counterclaim for attorneys' fees is dismissed with prejudice.

4/4/2019
DATE



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ANTHONY CANNATARO, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 GRANTED DENIED GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE