

Subway Real Estate Corp. v Saleem

2019 NY Slip Op 32340(U)

July 29, 2019

Supreme Court, New York County

Docket Number: 652759/2017

Judge: Margaret A. Chan

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.

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

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

-----X INDEX NO. 652759/2017

SUBWAY REAL ESTATE CORP. MOTION DATE _____

Plaintiff, MOTION SEQ. NO. 002

- v -

MUHAMMAD SALEEM, MUHAMMAD MALIK **DECISION + ORDER ON MOTION**

Defendants. -----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 123, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

In this matter regarding a breach of a settlement agreement, indemnification, and attorneys' fees, Defendant Muhammad Saleem moves pursuant to CPLR 2221(d) and (e) to reargue, or in the alternative, renew his previous motion to dismiss which was granted in part and denied in part by this court (NYSCEF #91 – Decision and Order dated March 22, 2019). Likewise, Plaintiff Subway Real Estate Company (SREC) cross-moves to substitute a party, amend its complaint, and to renew and reargue its previous motion for summary judgment, which was denied by the same order (*id.*). The Decision and Order is as follows:

FACTS

On March 22, 2019, this court granted Defendant Saleem's motion to dismiss claims predicated on an underlying sublease with SREC for a Subway sandwich shop location ("the March 22 order or "the prior order") (NYSCEF #91 – the March 22 order, at 5). In that same order, Defendant Saleem's pre-answer motion to dismiss Plaintiff's claims relating to the parties' Stipulation of Settlement dated January 12, 2016 ("the Stipulation"), was denied as was Plaintiff's cross-motion to covert Defendant's motion to dismiss into a motion for summary judgment (*id.*).

For background, the parties¹ entered into a Stipulation of Settlement dated January 12, 2016, that resolved litigation involving unpaid rent and property taxes

¹ Defendant Muhammad Malik has not appeared in this matter.

(NYSCEF #95). Importantly for the instant motion, Paragraph 22 of the Stipulation states that “Third-Party Defendants [Saleem] agree to indemnify and hold Defendant [Subway Real Estate Corporation] harmless for any liability, damages, claims or judgements arising from this litigation, and shall reimburse Defendant for any and all costs and expenses incurred, including, but not limited to, reasonable attorneys’ fees, costs, disbursements, and expenses” (*id.* at ¶22). The court also understood the agreement to be an indemnification for prior activity, not prospective indemnification (NYSCEF #91 at 4).

DISCUSSION

Both parties seek leave to reargue and renew the parts of the prior order.

A motion for reargument pursuant to CPLR 2221(d) “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion”. The movant bears the burden of demonstrating that “the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*id.*). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present argument different from those originally asserted” (*id.*). Thus, the motion is not intended as a vehicle to rehash what has already been argued or for raising new questions (*see Simpson v Loehmann*, 21 NY2d 990, 990 [1968]).

A motion for CPLR 2221(e) renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination”. CPLR 2221(e)(3) states that the motion “shall contain reasonable justification for the failure to present such facts on the prior motion” (*William P. Pahl Equipment Corp. v Kassiss*, 182 AD2d 22, 27 [1st Dept 1992]).

Defendant’s Motion to Reargue and Renew

Defendant moves for reargument claiming that this court misapprehended the facts and law in this matter and failed to dismiss Plaintiff’s third cause of action (NYSCEF #90, Defendant Aff in Support of Motion, at ¶6). Defendant’s motion to reargue is granted, and upon reopening, Defendant’s motion to dismiss Plaintiff’s third cause of action is granted for the following reasons:

Defendant argues that Paragraph 22 of the Stipulation does not support Plaintiff’s third cause of action (*id.* at ¶9). Plaintiff’s third cause of action alleges that “Defendants are liable to SREC for attorneys’ fees and expenses incurred in the prosecution of this action” (NYSCEF #94, Complaint, at ¶42). Defendant contends

that neither the Stipulation nor any purported sublease supports Plaintiff's claims for attorneys' fees in this matter.

Defendant also argues that the lack of clarity in the language of Paragraph 22 of the Settlement indicates that no attorneys' fee indemnification agreement is at play in this matter (NYSCEF #90, at ¶10). Specifically, Defendant argues that to trigger attorneys' fee indemnification in New York, the parties must make their intentions "unmistakably clear" (*id. citing Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487 [1989]). Defendant contends that the language in the Stipulation of Settlement is not "unmistakably clear" and "does not even contemplate prospective indemnification" and therefore cannot be the basis of the third cause of action (*id.*). Defendant further claims that the contractual provision does not obligate the Defendant to indemnify Plaintiff because the Defendant never signed a written sublease nor agreed to an oral sublease (*id.* at ¶11).

Defendant is correct: The March 22 order predicated Plaintiff's third cause of action regarding attorneys' fees on the sublease and resolved the issue in Defendant's favor. However, the March 22 order is only partially correct as Plaintiff's third cause of action can be predicated also on the Stipulation.

Paragraph 22 states that "Third Party Defendants [Saleem] agree to indemnify and hold Defendant [SRE] harmless for any liability damages, claim or judgments arising from this litigation, and shall reimburse Defendant for any and all costs and expenses incurred including, but not limited to, reasonable attorneys' fees, costs, disbursements and expenses" (NYSCEF # 95, at ¶22). As discussed at length in the March 22 Order, this language indicates retrospective, and not prospective indemnification. As specified by the handwritten alterations, the parties explicitly eliminated language allowing for reimbursement of attorneys' fees arising from a breach of the Stipulation (*id.*). Due to the alterations made to Paragraph 22 of the Stipulation, prospective indemnification is barred, and thus Plaintiff may not recover attorneys' fees for the instant action based on the Stipulation. As such, this reading of Paragraph 22 of the Stipulation combined with the fact that Plaintiff's action cannot be predicated on the purported sublease between the parties necessitates dismissal of Plaintiff's third cause of action.

Defendant seeks leave to renew and upon renewal, his motion to dismiss the complaint should be granted. The premise of Defendant's motion for renewal is his allegation that SRE is not authorized to conduct business in New York (*id.* at ¶13). Defendant provides the court with documentation showing that Plaintiff's authorization to conduct business was terminated on December 3, 2018 (NYSCEF #26, NYS Department of State Division of Corporations Entity Information: NYSCEF #90, ¶14). Defendant asks the court to grant the motion for leave to renew based on this new fact and the court's exercise of discretion in the interest of justice (NYSCEF #89, Defendant's Notice of Motion, at ¶13).

Defendant contends that Plaintiff's remaining causes of action be must be dismissed because of the "newly discovered fact that Plaintiff is not authorized to conduct business in New York". Defendant is incorrect (NYSCEF #90, at ¶17). As of May 20, 2019, SRE is a registered agent in New York and the proper successor-in-interest in this matter, as addressed immediately below in Plaintiff's Cross-motion to substitute a party (NYSCEF #132). As such, there is no question that SRE is entitled to pursue this litigation. Thus, this branch of Defendant's motion to renew is denied.

Plaintiff's Cross-Motion to Substitute

Plaintiff SREC seeks to substitute Subway Real Estate LLC (SRE) as the successor-in-interest to SREC. SREC states that as part of an internal corporate restructuring, SREC assigned certain lease agreements to SRE on September 12, 2011 (NYSCEF #132). SREC submits a printout from the New York State Department of State, Division of Corporations showing that SRE properly exists in Delaware and is authorized to do business in New York (NYSCEF #129 at ¶20). SREC asserts that this substitution does not prejudice the Defendant (*id.* at ¶23).

Pursuant to CPLR 1018, "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." CPLR 1021 instructs that "a motion for substitution may be made by the successor or representatives of a party or by any party." Courts are relatively liberal with the timeliness of the substitution requirement in order to maintain the public policy "to dispose of matters on the merits" (*see Peters v City of New York Health and Hospitals Corp.*, 48 AD3d 329, 528 [1st Dept 2008]).

Here, substitution does not prejudice the Defendant because the motion is made promptly and would allow the case to be decided fairly, on its merits. SRE is a proper successor-in-interest to SREC. Thus, SREC's motion to substitute is granted.

Plaintiff's Cross-Motion to Reargue and Renew

Plaintiff claims that the court wrongfully dismissed its first and second causes of action to the extent that they are based on the terms of the sublease (NYSCEF #128, at ¶5). Plaintiff insists that the court misapprehended facts and law when it decided that "indemnification pursuant to the sublease is barred based on the Stipulation of Settlement" (*id.*). Plaintiff argues that the language in Paragraph 19 of the Stipulation has a "carve-out for such obligations" and that Defendant should not be released from all indemnification obligations (*id.* at ¶6, 11). Plaintiff requests that the court hold Defendant to the performance of his

obligations under the sublease because the sublease was ratified by Defendant's actions (*id.* at ¶12).

Plaintiff's cross-motion for leave to reargue is denied. Plaintiff does not show that the court misapprehended any facts or law in its previous order. The Stipulation was clear – it operated as a release of all claims “arising from or relating to [SRE's] and/or [Saleem's] occupancy of the Premises and arising under the Lease.” (NYSCEF #109, Stipulation, at ¶19). Paragraph 19 continues: “[s]pecifically excepted from the operation of the foregoing releases are: (i) the obligations, representations and/or warranties of the parties under this Stipulation; and (ii) the rights and remedies of the parties reserved and preserved in this Stipulation” (*id.*). This bars Plaintiff from making claims predicated on the sublease, as such claim would necessarily arise from Saleem's occupancy of the premises. The only excepted items are obligations and remedies preserved in the Stipulation. As the court stated in the prior order, Plaintiff may still be entitled to obligations owed to it under the Stipulation, such as the unpaid Real Estate Taxes at the heart of the Stipulation and previously accrued attorneys' fees relating to the litigation that led up to the Stipulation.

Plaintiff claims that the court overlooked the handwritten changes to Paragraph 23 of the Stipulation in dismissing Plaintiff's second cause of action for attorneys' fees (NYSCEF #128, at ¶7). Plaintiff contends that the changes made to Paragraph 23 of the Settlement reserves Plaintiff's “right to its claims for legal fees” from Defendant Saleem (*id.*).

Plaintiff's assertion that the court overlooked Paragraph 23 is academic as Paragraph 23, in effect, repeats Paragraph 22 that was specifically addressed in the March 22 order. In any event, the handwritten section of Paragraph 23 of the Stipulation reads: “[SREC] reserves the right to its claim for legal fees from Third-Party Defendants in this litigation. Third-Party Defendants dispute the obligation to reimburse legal fees to Defendant. Subway shall not drawdown upon any money being held on account for Third-Party Defendants to satisfy the purported obligation to reimburse legal fees until there has been an adjudication or a Settlement.” (*id.* at ¶23). The prior order did not disturb Plaintiff's entitlement to attorneys' fees in the prior litigation as Plaintiff asserts in the instant motion. Accordingly, Plaintiff may be entitled to collect attorneys' fees from Saleem previously accrued in the underlying dispute between SREC, Saleem, and the over-landlord. And, contrary to Plaintiff's interpretation of the prior order, Plaintiff's second cause of action is still alive. The branch of Plaintiff's cross-motion for reargument is denied.

Plaintiff's Cross-Motion to Amend Complaint

Plaintiff cross-moves to amend its complaint pursuant to CPLR 3025(b). Plaintiff's proposed amended complaint includes new causes of action regarding use and occupancy, unjust enrichment and quantum meruit (NYSCEF # 128, at ¶3).

A motion for CPLR 3025(b) to amend or supplement the pleading is typically "freely given upon such terms as may be just including the granting of costs and continuances" and shall be "accompanied by the proposed amended or supplemented pleading clearly showing the changes or additions." Leave to amend is often granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (*see Davis v South Nassau Communities Hospital*, 26 NY3d 563, 580 [2015]).

The branch of Plaintiff's cross-motion to amend its complaint is denied. While Defendant would not be surprised or prejudiced by the addition of new claims, Plaintiff's proposed amended complaint plainly lacks merit. A court must examine the merit of the proposed amendment in order to conserve judicial resources (*see 360 West 11th LLC v ACG Credit Company II, LLC*, 90 AD3d 552, 553 [1st Dept 2011]). As such, a motion for leave to amend a pleading "must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*Zaid Theatre Corp v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). When a court concludes that an application for leave to amend a pleading clearly lacks merit, leave is properly denied (*see Davis & Davis v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

The cross-motion to amend the complaint lacks merit because the three new causes of action are rooted in the same issues that surrounded the unsigned sublease. However, this court determined that the Stipulation acts as a release of claims arising from this sublease (NYSCEF #91, at 3). These new causes of action are backdoor attempts to litigate the same issue as the sublease, which were resolved by the Stipulation. There is thus no merit to Plaintiff's cross-motion to amend its complaint; it is denied.

Accordingly, it is ORDERED that the branch of Defendant Muhammad Saleem's motion to reargue, and upon reopening, dismiss Plaintiff's third cause of action is granted; it is further

it is further ORDERED that Defendant Muhammad Saleem's motion to renew and, upon reopening, dismiss the remainder of Plaintiff's complaint is denied; it is further

ORDERED that the branch of Plaintiff's cross-motion to reargue the determination of this court's March 22, 2019 Order is denied; it is further

ORDERED that the branch of Plaintiff Subway Real Estate Corp's cross-motion to substitute Subway Real Estate LLC as plaintiff is granted; the Clerk of the Court is directed to amend the caption as follows:

SUBWAY REAL ESTATE LLC. f/k/a
SUBWAY REAL ESTATE CORP.

Plaintiff,

- v -

SALEEM, MUHAMMAD; MALIK, MUHAMMAD
Defendants.

_____X

it is further ORDERED that the branch of Plaintiff's cross-motion to amend its complaint is denied; and it is further

ORDERED that the parties appear for their previously scheduled compliance conference on October 16, 2019 at 9:30 AM in Part 33, 71 Thomas St., New York, NY 10013.

This constitutes the Decision and Order of the court.

7/29/2019
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE	
		<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER