Wah Win Group Corp. v 979 Second Ave. LLC
2019 NY Slip Op 32725(U)
September 12, 2019
Supreme Court, New York County
Docket Number: 155492/2017
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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WAH WIN GROUP CORPORATION,

Plaintiff,

- v -

979 SECOND AVENUE LLC and ELIAS TSINIAS,

Defendants.

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INDEX NO. 155492/2017

MOTION SEQ. NO. 002

DECISION AND ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for RENEWAL.

Upon the foregoing documents, it is ordered that the motion is **decided as follows.**

In this action, plaintiff-restaurant Wah Win Group Corporation ("WWG Corporation") moves, pursuant to CPLR 2221, for reargument and renewal of a prior decision and order of this Court rendered on January 10, 2019. The prior decision granted a motion by defendants 979 Second Avenue LLC ("979 LLC") and Elias Tsinias ("Tsinias") to dismiss the complaint (motion sequence 001) in its entirety. WWG Corporation now seeks leave to renew 979 LLC and Tsinias' motion to dismiss and, upon renewal, reinstatement of its second cause of action. Plaintiff further seeks leave for reargument on defendants' motion and, upon reargument, reinstatement of the third cause of action. Defendants oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **decided as follows.**

FACTUAL AND PROCEDURAL BACKGROUND:

The relevant facts are briefly recounted herein: Plaintiff WWG Corporation and defendant 979 LLC entered into a lease agreement for the storefront and a portion of the basement of a building located at 979 Second Avenue in Manhattan. (Doc. 42 at 1.) Plaintiff entered into the lease with the intention of opening a Chinese restaurant at the premises. (*Id.* at 1–2.) The term of the lease was from April 1, 2011, to March 31, 2021. (*Id.* at 1.) Defendant Tsinias signed the lease in his capacity as the principal owner and manager of 979 LLC. (*Id.*)

The instant action was commenced on June 16, 2017. (*Id.* at 2.) Plaintiff set forth four causes of action in the complaint, the second and third of which are relevant to the instant motion. (*Id.*) The second cause of action sought compensation for the alleged loss of profits as a result of plaintiff's inability to open a Chinese restaurant at the premises, which in turn was a result of electric company Con Edison having shut off the gas in the building in 2011 due to a gas leak. (*Id.*) The third cause of action sought an abatement of rent due to a water leak that occurred in June of 2016, and demanded that 979 LLC repair any property that was damaged by the leak. (*Id.*)

In motion sequence 001, defendants moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint in its entirety.[1] (*See id.*) By a decision and order rendered on January 10, 2019, this Court granted the motion. (Doc. 42.) With respect to plaintiff's second cause of action, this Court reasoned that defendant 979 LLC could not be held liable for plaintiff's alleged loss of profits resulting from the gas leak. (*Id.* at 5.) Specifically, this Court found that the lease established a defense to this cause of action because paragraph 20 of the lease provided that 979 LLC was not making any representations as "to the physical condition of the building" and that plaintiff was to take the premises "as is." (*Id.*) Moreover, this Court found that paragraph 9 of the lease, although

[1] Defendants filed motion sequence 001 in lieu of filing an answer. (Doc. 42 at 2.) Because this Court granted that motion (*see* Doc. 42), no answer has been filed to date.

obligating 979 LLC to apportion rent subsequent to a fire or any other casualty that destroyed or rendered the property unusable, provided that "each party shall look first to any insurance in its favor before making any claim against the other party . . . ." (*Id.*) Because the lease established a defense to the claim, this Court dismissed plaintiff's second cause of action. (*Id.* at 5.) For those same reasons, this Court also dismissed the third cause of action—rent abatement due to the June 2016 water leak—as against defendant 979 LLC. (*Id.*)

This Court also dismissed the complaint as against defendant Tsinias because there was no evidence showing that he had subjected himself to personal liability, especially in light of the fact that he signed the lease on behalf of 979 LLC as its "Managing Member Landlord." (*Id.* at 6.)

In motion sequence 002, WWG Corporation now moves, pursuant to CPLR 2221, for reargument and renewal. (Doc. 36.) Plaintiff seeks leave for renewal on its second cause of action and leave to reargue its third cause of action. (*Id.*) In support of its motion for leave to renew its second cause of action, WWG Corporation submits a "red tag" ticket issued by Con Edison that shows that the gas leak occurred within the building but *outside* the premises that plaintiff had leased. (Doc. 43.) Since the lease required 979 LLC to maintain the "public portions" of the building (Doc. 51 at 5), and since the gas leak occurred within the building but outside the demised premises, plaintiff argues that the Con Edison ticket shows that it has a viable cause of action against defendants for any damage caused by the gas leak. (Docs. 39 at 5–7; 51 at 5.) Moreover, plaintiff argues that the "as is" provision of the lease does not bar causes of action arising from the gas leak because the provision contains an exception for "latent defects" (Doc. 51 at 5) and because the gas leak was a latent defect for which defendants could be held liable (*id.*). WWG Corporation also submits an affirmation by its president, Yue Chao ("Chao"), who states that the red tag ticket

was not submitted in the prior motion because "it had been buried in the big pile of documents in connection with space renovation and restaurant equipment . . . ." (Doc. 37 at 2.)

In support of the branch of its motion to reargue its third cause of action for rent abatement due to the 2016 water leak, WWG Corporation asserts that the water burst occurred months after it took possession and therefore that the "as is" provision of the lease does not apply. (Doc. 39 at 8.) Plaintiff similarly emphasizes that defendants may be held liable for the water leak because, pursuant to the lease, plaintiff does not bear responsibility over latent defects. (*Id.* at 9.)

In opposition, defendants contend that the motion is procedurally defective because WWG Corporation failed to provide documents constituting "new facts" in support of the motion. (Doc. 46 at 4.) Specifically, defendants argue that the facts submitted by plaintiff in the instant motion—the Con Edison ticket as well as Chao's affidavit—are not new facts, but rather that they are identical to the facts that this Court considered in deciding the prior motion. (*Id.* at 5.) For example, defendants claim that plaintiff submitted Chao's affidavit in motion sequence 001. (*Id.* at 6.) They further argue that the motion is defective because WWG Corporation failed to submit the papers that were considered on the prior motion. (*Id.* at 4.)

In the alternative, defendants maintain that, even if plaintiff has submitted new facts on the instant motion, those facts are not relevant to plaintiff's causes of action because, in rendering the prior decision, this "Court did not dismiss any cause of action based on anything relating to the gas supply." (*Id.* at 7.) Last, defendants argue that the motion should be denied because Chao's allegation that the Con Edison ticket was buried in a pile of papers is not a reasonable justification for her not having presented it in support of the prior motion. (*Id.* at 8–9.)

LEGAL CONCLUSIONS:

a. Whether Leave to Renew Should be Granted.

On a motion for leave for renewal pursuant to CPLR 2221(e), a court may consider "new facts not offered on the prior motion that would change the prior determination . . . ." (CPLR 2221[e][2].) The motion to renew is "intended to direct the court's attention to new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore, not brought to the court's attention." (*Garner v Latimer*, 306 AD2d 209, 209 [1st Dept 2003].) A party moving for renewal must present the court with justification for failing to submit the new evidence with the initial motion. (*See Onglingswan v Chase Home Fin., LLC*, 104 AD3d 543, 544 [1st Dept 2013].) Although renewal is granted sparingly, (*see Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010] (citations omitted)), a court may nonetheless grant such relief so as not to defeat substantive fairness (*see Garner*, 306 AD2d at 210 (citations omitted)).

Here, this Court finds that the branch of plaintiff's motion for leave to renew the branch of defendants' prior motion to dismiss the second cause of action must be granted. As an initial matter, the procedural arguments advanced by defendants regarding the motion are unpersuasive. They argue that the motion is defective because WWG Corporation failed to submit the papers that were considered on the prior motion. (Doc. 46 at 4.) However, CPLR 2221—the governing provision for renewal and reargument motions—does not, by its terms, clearly specify the papers that need to be submitted. (*See* CPLR 2221.) In fact, *Keech v 30 E. 85th St. Co., LLC*, 154 AD3d 504, 504 [1st Dept 2017], the only First Department case cited by defendants in support of their argument regarding attachment of the prior motion papers (Doc. 46 at 4), actually supports plaintiff's position. That decision noted that CPLR 2214(c) "provides that a party filing a motion

in an e-filed action . . . need not include copies of papers that were previously filed electronically." (*Keech*, 154 AD3d at 504 (rejecting defendant's argument that renewal motion papers were inadequate for failing to attach papers that were already e-filed).) Since this is an e-filed case, and all relevant papers have been electronically filed, this Court may entertain the instant motion. (*See also Chan v Garcia*, 24 AD3d 197, 198 [1st Dept 2005] (determining that the trial court prudently entertained a motion where the record was sufficient to determine whether the moving parties were entitled to the relief that they were seeking).)

979 LLC's obligations to repair defective conditions in the building, and its liability for failure to fulfill those duties, are questions of law that can be decided by looking to the language of the lease, and its resolution will aid in the disposition of this action. (*See Searle Blatt & Co., Ltd. v Zurich Holding Co.*, 241 AD2d 303, 303 [1st Dept 1997].) By providing the Con Edison ticket that shows that a gas leak occurred within the building but *outside* the leased premises (Doc. 43), plaintiff has established that it has a viable cause of action for compensation from 979 LLC for the alleged loss of profits from plaintiff's inability to open a Chinese restaurant at the premises. That branch of this Court's prior decision dismissing the second cause of action was based, in part, on the fact that, in signing the lease, plaintiff was taking the premises "as is." (Doc. 42 at 5.) However, this provision of the lease does not operate in this instance to bar the second cause of action, since plaintiff alleges that the gas leak occurred five months after it took possession of the premises in April of 2011. (Doc. 39 at 5.) This is supported by the ticket issued by Con Edison, which is dated February 1, 2012. (Doc. 43.)

Defendants cannot claim that the Con Edison ticket does not constitute a new fact or that the ticket is irrelevant to the legal issues. In prosecuting its cause of action for damages resulting from the gas leak, plaintiff will need to prove that 979 LLC bore the responsibility of repairing the

leak. The Con Edison ticket is relevant to the resolution of that issue, since it must be determined whether 979 LLC was obligated to repair defective conditions that occurred within its own building yet outside the premises that plaintiff had leased. Further, in submitting Chao's affidavit, this Court finds that plaintiff's owner, who speaks little English and does not have a college education (Doc. 51 at 6), has proffered a reasonable excuse for not submitting the ticket in the prior motion. This Court also notes that plaintiff has not engaged in a pattern of dilatory behavior. For these reasons, the branch of plaintiff's motion seeking renewal on its second cause of action is granted.

b. Whether Leave to Reargue Should be Granted.

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. (*See Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].) "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] (citations omitted).) Thus, the motion is not to be used as a vehicle for rehashing what was already argued or for raising new questions. (*See Simpson v Loehmann*, 21 NY2d 990, 990 [1968].)

This Court similarly finds that the branch of plaintiff's motion seeking reargument of the branch of defendants' motion seeking dismissal of the third cause of action must be granted. The prior decision dismissed the third cause of action because it determined that defendants were not responsible under the lease for water leak damage. However, plaintiff has pointed out that 979 LLC may be responsible for latent defects pursuant to paragraph 20 of the lease, which provides

that plaintiff was accepting the premises "as is" except for latent defects. (Doc. 39 at 8–9.) Because the complaint alleged that the water leak occurred in apartments *above* the demised premises, the water leak may be a defective condition for which 979 LLC may be held responsible. For this reason, plaintiff should be allowed to prosecute its third cause of action against 979 LLC.

Finally, to the extent plaintiff's motion seeks leave to renew and reargue its second and third causes of action as against defendant Tsinias, those branches of the motion are denied, since plaintiff has submitted nothing in this motion to show that Tsinias may be held individually liable.

In accordance with the foregoing, it is hereby:

ORDERED that the branch of plaintiff Wah Win Group Corporation's motion seeking renewal of that portion of defendants 979 Second Avenue LLC and Elias Tsinias' prior motion seeking dismissal of the second cause of action is granted, and, upon renewal, plaintiff's second cause of action is reinstated as against defendant 979 Second Avenue LLC; and it is further

ORDERED that the branch of plaintiff's motion seeking reargument of that portion of defendants 979 Second Avenue LLC and Elias Tsinias' prior motion seeking dismissal of the third cause of action is granted, and, upon reargument, plaintiff's third cause of action is reinstated as against defendant 979 Second Avenue LLC; and it is further

ORDERED that the branch of plaintiff's motion seeking renewal and reargument of defendants 979 Second Avenue LLC and Elias Tsinias' prior motion seeking dismissal of the complaint is denied in its entirety as against defendant Elias Tsinias; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry upon all parties within 30 days of entry; and it is further

ORDERED that counsel for plaintiff is directed to serve, within 30 days from service of a copy of this order with notice of entry, the Clerk of the Court (60 Centre Street, Room 141B), who is directed to restore this action to this Court's calendar; and it is further

ORDERED that the Clerk of the Court is directed to mark the Court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that this constitutes the decision and order of the Court.

9/12/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION		
APPLICATION:	☐	GRANTED	☐ DENIED	☐	GRANTED IN PART	X	OTHER
CHECK IF APPROPRIATE:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE