Dan's Supreme Supermarkets, Inc. v Board of Mgrs. of Trump Palace Condominium
2019 NY Slip Op 32745(U)
September 13, 2019
Supreme Court, New York County
Docket Number: 160133/2018
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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DAN'S SUPREME SUPERMARKETS, INC.

Plaintiff,

- v -

BOARD OF MANAGERS OF TRUMP PALACE CONDOMINIUM,

Defendant.

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INDEX NO. 160133/2018

MOTION DATE 09/13/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

were read on this motion to/for DISMISS.

The critical issue is whether the Board of Managers of Trump Palace Condominium (the **Board**) may hold Dan's Supreme Supermarkets, Inc. (the **Tenant**) responsible for certain obligations set forth in the July Agreement (hereinafter defined). Because the July Agreement does not indicate that it is an amendment to the lease and neither the First Amendment (hereinafter defined) nor the Second Amendment (hereinafter defined) otherwise refer to the July Agreement and include the July Agreement in the definition of "Lease," and because the Board may not rely on the Estoppel Certificate (hereinafter defined), the court holds that the Board may not enforce the July Agreement as against the Tenant and the First and Second Counterclaims are dismissed.

By Notice to Cure (the **Notice**), dated June 14, 2018, Equity One (Northeast Portfolio) Inc. (**Equity One**) notified the Tenant of certain defaults, including the failure to comply with the maintenance and repair obligations set forth in the July Agreement, and demanded that such

defaults be cured (Complaint, ¶ 31). The Tenant commenced this action seeking a declaratory judgment from the court that (a) the July Agreement is not binding on the Tenant, (b) the Tenant is not responsible for the maintenance, repair, and replacement of the sidewalks and appurtenances abutting the property, and (c) the Tenant is not responsible for the maintenance and refinishing of the mirrored brass. The Board filed an answer with affirmative defenses and counterclaims. For its First Counterclaim, the Board seeks attorneys' fees in connection with the enforcement of the July Agreement (Answer, ¶¶ 27-30). For its Second Counterclaim, the Board seeks a declaratory judgment from the court declaring that Tenant is bound by the terms and conditions of the July Agreement (*id.*, ¶¶ 31-39). The Tenant now moves to dismiss the First and Second Counterclaims arguing that dismissal is required because such claims are based on the July Agreement which it was not a party to, which July Agreement does not run to the successors and assigns of the A&P, and which July Agreement was not otherwise incorporated into the Lease. Additionally, the Tenant argues to the extent that the prior tenant, the Great Atlantic & Pacific Tea Company, Inc. (**A&P**), executed an estoppel certificate acknowledging its obligations under the July Agreement and indicating that it was an amendment of the Lease, the Board may not rely on the Estoppel Certificate based on its express language.

Discussion

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The

court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]).

A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Reference is made to (i) a certain Amended and Restated Lease (the **Original Lease**), dated January 12, 1999, between R&J Company LLC (**R&J Co.**) as landlord and A&P pursuant to which A&P leased a certain retail condominium unit in the Trump Palace Condominium located at 1175 Third Avenue, as amended by a certain First Amendment to Lease (the **First Amendment**), dated May 8, 2013, Equity One as landlord and A&P Real Property, LLC, as successor-in-interest to A&P, as further amended by a Confirmation of Assumption and Assignment of Lease and Second Amendment to Lease (the **Second Amendment**; the Original Lease, the First Amendment, and the Second Amendment, collectively, hereinafter the **Lease**), dated November 9, 2015, between Equity One as landlord-assignor and 1175 Third Avenue Market LLC as predecessor-in-interest to the Tenant (Grobman Aff, Exhibits C, D and E), (ii) a certain Agreement, dated July 3, 2007 (the **July Agreement**), by and among and the A&P d/b/a The Food Emporium, Inc. as tenant, R&J Co. as unit owner, and the Board pursuant to which A&P agreed, among other things, that it would be responsible to undertake certain maintenance

and repair obligations, including to "vigilantly maintain the sidewalks," perform repair work of the granite façade, and clean and polish all exterior brass two times per year (Grobman Aff, Exhibit F, ¶ [1] [A]), and (iii) an Estoppel Certificate, dated July 31, 2010, from Shopwell, Inc. c/o A&P to and for the benefit of R&J Co. as landlord, the Guardian Life Insurance Company of America as lender, and Equity One as purchaser (Grobman Aff, Exhibit G).

I. The "Lease" Is Not Defined in the Lease Documents as Including the July Agreement

A. The July Agreement Does Not Indicate That It Is a Lease Amendment

Remarkably, the July Agreement does not indicate that it is an amendment to the Lease or otherwise provide that the obligations under the July Agreement run to the successors of A&P. Indeed, to the extent that the July Agreement refers to "Pre-Existing Agreements" – the "Pre-Existing Agreements" are defined as agreements, dated June 27, 2002, and September 22, 2005 – such agreements are identified as Exhibit A and Exhibit B respectively to the July Agreement but are not otherwise attached to the version of the July Agreement provided to the court. And, in any event, based on the dates of those alleged agreements, such agreements are not part of the Original Lease or its amendments. Therefore, the terms of the July Agreement cannot be a basis for finding that the July Agreement was an amendment to the "Lease."

B. The Definition of Lease Set Forth in the First Amendment and Second Amendment Does Not Include the July Agreement

The definition of Lease set forth in the First Amendment of Lease does not include the July Agreement. The "Lease," as defined in the First Amendment, is solely defined as the "Amended

and Restated Lease dated as of January 12, 1999" – *i.e.*, the July Agreement, executed after the Original Lease and prior to the First Amendment, is not included in the definition of "Lease." There is no provision of the First Amendment which otherwise incorporates the July Agreement and otherwise makes it a part of the Lease. Indeed, Section 16 of the Lease titled Ratification of Lease provides:

> 16. Ratification of Lease. Except as modified by this Amendment, all of the terms, covenants and provisions of the Lease are and shall remain in full force and effect and are hereby ratified in all respects. From and after the date hereof, all references to the Lease (whether contained in the Lease, in this Amendment or in any other document) shall be deemed to mean the Lease as modified by this Amendment (Grobman Aff, Exhibit D, ¶ 16).

The Second Amendment also does not refer to the July Agreement or otherwise incorporate the July Agreement in the definition of "Lease." The Second Amendment refers to the Original Lease and the First Amendment – but not the July Agreement:

> A. The Landlord made an entered into that certain Amended and Restated Lease (the "Original Lease"), dated January 12, 1999, with The Great Atlantic & Pacific Tea Company, Inc., for that certain premises located at 1175-1185 Third Avenue, in the city of New York, New York (the "Leased Premises"), which Original Lease was amended by First Amendment to Lease made as of May 8, 2013 between Landlord and A&P Real Property, LLC, as successor to The Great Atlantic & Pacific Tea Company, Inc (Grobman Aff, Exhibit E, ¶ A).

Therefore, the Second Amendment also cannot be a basis for incorporating the July Agreement and does not otherwise provide a basis for enforcement of the July Agreement by the Board against the Tenant.

II. The Board Cannot Rely on the Estoppel Certificate

Section 34. of the Lease titled Estoppel Certificates provides that either party may request an estoppel certificate stating, among other things, that the lease has not been modified or, if there have been any modifications, stating such modifications and certifying that the Lease is otherwise in full force and effect as modified (Grobman Aff, Exhibit C, ¶ 34). In response to a demand made pursuant to this provision, Shopwell, Inc. (a subsidiary of A&P and a prior tenant of the subject retail unit), provided the Estoppel Certificate. The Estoppel Certificate provides that "[t]he lease has not been modified either orally or in writing" except for three agreements, including the July Agreement (*id.*, ¶ 1 [b]).

However, and most significantly, the Estoppel Letter also provides:

> [t]hese certifications are given as of the date hereof to Landlord, Lender, Purchaser and their respective successors and assigns ***and to no other party or for any other purpose*** and shall not be deemed to . . . vary, modify or waive any of the terms of the Lease or any rights or privileges of the Tenant thereunder [emphasis added] (Grobman Aff, Exhibit G, at 3).

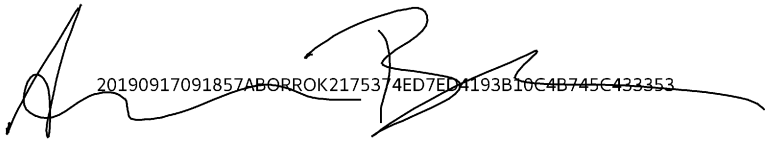
It is beyond dispute that the Landlord, Lender, Purchaser and their respective successors and assigns may rely on the certifications set forth in the Estoppel Certificate. However, the problem with the Board relying on the Estoppel Certificate to enforce the July Agreement is that the Board is not the Landlord, Lender, or Purchaser, or a successor or assignee of any such party, and is not otherwise purporting to act as agent on behalf of any of the foregoing. Accordingly, the Board may not rely on the Estoppel Certificate as a basis for enforcing the July Agreement.

Therefore, inasmuch as the documentary evidence conclusively establishes that (i) the July Agreement does not by its terms either amend the Lease, change the definition of Lease to include the July Agreement, or run to the successors and assigns of A&P, (ii) the definition of

"Lease" set forth in the First Amendment and Second Amendment otherwise does not include the July Agreement let alone mention it at all, and (iii) the Estoppel Certificate cannot be relied on by the Board, the First and Second Counterclaims must be dismissed.

Accordingly, it is

ORDERED that the plaintiff's motion to dismiss the First and Second Counterclaims is granted.



9/13/2019
DATE

ANDREW BORROK, J.S.C.

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