

**Grocery Leasing Corp. v P&C Merrick Realty Co.,
LLC**

2019 NY Slip Op 34701(U)

July 26, 2019

Supreme Court, Queens County

Docket Number: Index No. 707253/2017

Judge: Marguerite A. Grays

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FILED
JUL 31 2019
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

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GROCERY LEASING CORP.,

Index
No.: 707253/2017

Motion
Dated: March 19, 2019

Plaintiff(s),

-against-

Motion
Cal. No.: 5

P&C MERRICK REALTY CO., LLC,
104-16 LLC, AND GOLDEN PROGRESS, INC.

Motion
Seq. No.: 8 *(Signature)*

Defendant(s).

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The following papers numbered EF118-EF130, EF107, EF135 read on this motion by plaintiff pursuant to CPLR §5015 to vacate the Order dated September 12, 2018, and entered on September 18, 2018, and upon vacatur, to consider plaintiff's opposition papers with respect to the underlying motion by defendants 104-16, LLC and Golden Progress, Inc. (Golden Progress) (motion sequence number "3"), and deny that motion by those defendants.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF118-EF130
Answering Affidavits - Exhibits	EF107
Reply Affidavits	EF135

Upon the foregoing papers, it is ordered that the this motion is determined as follows:

Plaintiff commenced this action asserting a First cause of action for breach of a lease, and tortious interference with contract, and seeking monetary, injunctive and declaratory relief. Defendants 104-16, LLC and Golden Progress, Inc. (Golden Progress) served a joint answer. Defendant P&C Merrick did not answer, but rather, moved (motion sequence number "1") pursuant to CPLR §3212 and General Obligations Law § 5-701 to dismiss the complaint insofar as asserted against it. By Order dated December 22, 2017, and entered on January 11, 2018, the branch of the motion by defendant P&C Merrick pursuant to CPLR §3212 was denied as premature. The branches of the motion by defendant P&C Merrick to dismiss the complaint insofar as asserted against it for failure to state a claim

pursuant to CPLR §3211(a)(7) and to cancel the Notice of Pendency were granted, and that branch of the motion by defendant P&C Merrick for an award of attorneys' fees pursuant to the lease was denied.

Plaintiff served and filed an amended complaint on January 11, 2018, following the entry of the December 22, 2017 Order.

On January 30, 2018, plaintiff moved (motion sequence number "2") for leave to reargue the December 22, 2017 Order, and upon reargument, to deny the motion by defendant P&C Merrick to dismiss the complaint insofar as asserted against it and reinstate the Notice of Pendency, and in the alternative, for leave to serve and file an amended complaint "should the Court find that [plaintiff] was not permitted to file an amended complaint as of right and without leave." Plaintiff annexed a copy of the amended complaint, previously served and filed, and offered it as the proposed amended complaint, if the Court determined it had not been permitted to file it without leave. By Order dated March 14, 2018, and entered on March 19, 2018, the motion by plaintiff for reargument was denied.

On June 1, 2018, defendants 104 16, LLC and Golden Progress served and filed a motion (motion sequence number "3") pursuant to CPLR §3211(a)(7) to dismiss the first and second causes of action asserted against them, and pursuant to CPLR §3212 for summary judgment in favor of defendants on the First and Second causes of action. The Notice of Motion demanded service of any answering papers at least seven (7) days before the return date set therein for June 26, 2018 (see CPLR §2214[b]).

On June 19, 2018, plaintiff served opposition papers upon defendants 104-16, LLC and Golden Progress by e-filing the documents (see 22 NYCRR 202.5-b[f][2][ii]). Plaintiff also caused a working copy of the opposition papers to be mailed by first-class mail to the Part Clerk of the "Commercial Division- Part B" on June 19, 2018. Defendants 104-16, LLC and Golden Progress e-filed reply papers in further support of their motion on June 25, 2018.

The motion (motion sequence number "3") was marked fully submitted, no opposition, on June 26, 2018. By Order dated September 12, 2018, and entered on September 18, 2018, the branch of the motion by defendants 104-16, LLC and Golden Progress which sought to dismiss the First and Second causes of action was granted, "there being no opposition," and the branch of the motion by defendants 104-16, LLC and Golden Progress for summary judgment in favor of defendants on the First and Second causes of action was denied. Defendants 104-16, LLC and Golden Progress served a copy of the Order with Notice of Entry upon plaintiff on September 19, 2018.

That branch of plaintiff's motion to vacate so much of the order dated September 12, 2018 and entered on September 18, 2018, which denied the branch of the motion by defendants 104-16, LLC and Golden Progress pursuant to CPLR §3212 for summary judgment in favor of defendants on the First and Second causes of action, is denied. Plaintiff is not aggrieved from that portion of the order.

With respect to that branch of plaintiff's motion to vacate so much of the Order dated September 12, 2018 and entered on September 18, 2018, which granted, upon default, the branch of the motion by defendants 104-16, LLC and Golden Progress to dismiss the First and Second causes of action asserted in the complaint, this Court's rules require the Court be provided a working copy of documents filed electronically (see 22 NYCRR 202.5-b[d][5]) in relation to a motion or opposition thereto, and that such working copies be submitted to the Part Clerk on the first noticed return date of the motion, and must include, firmly affixed thereto, a copy of the confirmation notice received from the New York State Court Electronic Filing site upon the electronic filing of such document (see 22 NYCRR 202.5-b[d][3][ii], [5]). The Court's rules provide that motions are heard on Tuesdays at 10:00 A.M., there are two calls of the motion calendar, and "[a]nswering papers, including cross-motions, affirmations and reply affirmations, will be accepted only on the return date in the Part."

Although plaintiff timely served and filed its opposition to the motion by defendants 104-16, LLC and Golden Progress (motion sequence number "3") (see CPLR §2214[b]), it failed to comply with the Court's rules, insofar as plaintiff sent the working copy of the opposition papers filed electronically to the Part Clerk of "Commercial Division Part B" by first-class mail, which mailing did not guarantee it would arrive in the correct part on the return date. In addition, plaintiff did not submit them to the Part Clerk on June 26, 2018. Nevertheless, plaintiff made a good faith attempt to provide the Court with a working copy of its opposition papers, and the failure by plaintiff to submit the working copy to the Part Clerk on the first noticed return date of the motion, did not prejudice defendants 104-16, LLC and Golden Progress, insofar as they had been timely served with the opposition papers, filed a reply thereto (EF Doc. #107), stipulated to allow the Court's consideration of plaintiff's opposition papers and their reply papers, and attempted to submit the working copy of the stipulation and their reply papers to the Court (albeit too late). In light of the strong public policy favoring the resolution of matters on the merits, and in the interest of justice, the branch of the instant motion to vacate so much of the Order entered on September 18, 2018, granting dismissal of the First and Second causes of action asserted against defendants 104-16, LLC and Golden Progress pursuant to CPLR §3211(a)(7), is granted (CPLR §5015[a][1]), and upon vacatur, the opposition papers of plaintiff and the reply papers of defendants 104-16, LLC and Golden Progress shall be considered by the Court.

Defendants 104-16, LLC and Golden Progress contend that the first and second causes of action asserted against them in the complaint fail to state a cause of action (*see* CPLR §3211[a][7]). In support of their motion, they submit, among other things, a copy of the original complaint.

Plaintiff asserts the original complaint has been superseded by the amended complaint, served and filed prior to the making of the motion by defendants 104-16, LLC and Golden Progress, and therefore, argues the branch of the motion by defendants 104-16, LLC and Golden Progress to dismiss the First and Second causes of action asserted in the original complaint should be denied as academic.


Defendants 104-16, LLC and Golden Progress counter that their motion properly addresses the First and Second causes of action asserted against them in the original complaint, because the original complaint is the operative complaint and not the amended complaint.

Although the Court did not grant plaintiff leave to amend the complaint when it denied plaintiff's motion (motion sequence number "2") for leave to reargue, at the time of the making of the motion, the amended complaint had already been served and filed without leave of court. Such service and filing was beyond the time within which an amendment could have been made as of right (*see* CPLR §3025[a]). Nevertheless, defendants 104-16, LLC and Golden Progress failed to reject the amended complaint, and as a consequence, have waived any objection to it on the basis it was served and filed without leave of court, beyond the time within which an amendment could have been made as of right (*see Chiulli v Coyne*, 210 AD2d 450 [1994]; *Nassau County v Incorporated Vil. of Roslyn*, 182 AD2d 678, 679 [1992]). As a consequence, the amended complaint has superseded the original complaint, and is the only complaint in this case (*see R & G Brenner Income Tax Consultants v Gilmartin*, 166 AD3d 685 [2018]; *St. Lawrence Explosives Corp. v Law Bros. Contr. Corp.*, 170 AD2d 957, 957 [1991]). To the extent the branch of the motion by defendants 104-16, LLC and Golden Progress to dismiss is addressed only to the First and Second causes of action asserted against them in the original complaint, it is rendered academic because the complaint was amended prior to the making of their motion.

However, to the extent the amended complaint purports to set forth claims against defendant P&C Merrick, such claims are improperly asserted by plaintiff, because the causes of action as against defendant P&C Merrick were dismissed *prior* to the service and filing of the amended complaint, and cannot be reasserted without leave of court (*see generally Janssen v Incorporated Vil. of Rockville Ctr.*, 59 AD3d 15 [2008]; *cf. Rodriguez v Dickard Widder Industries*, 150 AD3d 1169 [2017]).

Accordingly, the branch of the motion (motion sequence number "3") by defendants 104-16, LLC and Golden Progress pursuant to CPLR §3211(a)(7) to dismiss the First and Second causes of action asserted against them in the original complaint, is denied as academic, and defendants 104-16, LLC and Golden Progress are directed to serve an amended answer to the amended complaint, or move in relation to the amended complaint, within 20 (twenty) days of service of a copy of this Order with Notice of Entry.

Dated: **JUL 26 2019**



J.S.C.

FILED
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