

Beach Lofts, Ltd. v Cellular Tel. Co.

2020 NY Slip Op 30267(U)

January 9, 2020

Supreme Court, New York County

Docket Number: 653376/2019

Judge: Andrew Borrok

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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. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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BEACH LOFTS, LTD.

Plaintiff,

- v -

CELLULAR TELEPHONE COMPANY D/B/A AT&T
WIRELESS SERVICES,

Defendant.

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INDEX NO. 653376/2019
MOTION DATE 08/07/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISSAL

Upon the foregoing documents and for the reasons set forth on the record (1/9/2020), the defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is granted.

Reference is made to a certain License Agreement (the Original Agreement), dated August 28, 2000, by and between Beach Lofts, Ltd. (Beach Lofts) as licensee and Cellular Telephone Company d/b/a AT&T Wireless Services (AT&T) as licensor, as amended by An Amendment to Lease [sic] Agreement (the First Amendment) dated June 22, 2001 (NYSCEF Doc. No. 8), by and between Beach Lofts and AT&T, as further amended by an Amendment to License Agreement (the Second Amendment) dated January 24, 2003 (NYSCEF Doc. No. 9), by and between Beach Lofts and AT&T, and as further amended by an Amendment to License Agreement (the Third Amendment) dated April 20, 2004 (NYSCEF Doc. No. 10), by and between Beach Lofts and AT&T, and further amended by a Fourth Amendment to License Agreement (the Fourth Amendment; the Original Agreement, together with the First

Amendment, the Second Amendment, the Third Amendment and the Fourth Amendment, collectively, hereinafter, the **License Agreement**) dated October 19, 2011 (NYSCEF Doc. No 11), by and between Beach Lofts and AT&T.

Pursuant to the Original Agreement, AT&T licensed space from Beach Lofts located at 10 Beach Street, New York, NY (the **Premises**) for “an initial five (5) year term, followed by annual automatically renewable terms” (License Agreement, § 2; NYSCEF Doc. No. 7). The Original Agreement also provides that:

Notwithstanding anything in this License, either party may choose, for any or no reason, to terminate this License and render it null and void by notice to the other party, effective (a) one (1) year after delivered to CTC by Licensor, provided Licensor cannot terminate this License during the Initial term, (b) ninety (90) days after delivered to License by CTC, or (c) seven (7) days after delivered by either party if the party receiving the notice has defaulted under this License and fails to cure the default within ten (10) days of written notice of same.

(*id.*).

Pursuant to the Second Amendment, the parties agreed to modify the term by defining the “Term” as commencing on November 20, 2000 and indicating that the term was for approximately 18 years (i.e., terminating on February 28, 2018). To wit, paragraph 1 of the Second Amendment provides:

Licensor and Licensee agree that the Licensee Fee payable under the License Agreement will be amended and that beginning with the Licensee Fee Payment due on March 1, 2003, the new License Fee amounts payable by Licensee will be the amounts set forth on Schedule I. Licensee will pay such License Fee amounts for the period beginning March 1, 2003 and continuing each month for 180 months thereafter (“Term”) as set forth on Schedule I. Licensee will be obligated to pay License Fee Payments during the Term and such obligation will not be subject to offset or termination by Licensee.

(Second Amendment, ¶ 1; NYSCEF Doc. No. 9).

Paragraph 3 of the Second Amendment further provides:

The *term of the License Agreement is amended* as follows: The License Agreement term commenced on November 20, 2000 (the "Commencement Date") and shall end on the later of the defined period of 180 months or the current license term immediately prior to this amendment including all extensions, which shall hereafter be known as February 28, 2018 (the "Termination Date").

(Second Amendment, ¶ 3; NYSCEF Doc. No. 9 [emphasis added]).

The Second Amendment also modified AT&T's termination rights as follows:

Licensee may terminate the portions of this agreement related to operations at the licensed premises at any time, in its sole discretion, upon ninety (90) days written notice to the Licensor, provided that Licensee's obligation to pay license fee payments during the License Term described in the Amendment shall remain in full force and effect for such License Term."

(*id.*, Schedule II, ¶ 9; NYSCEF Doc. No. 9).

Significantly, the Fourth Amendment created an extension term which followed the expiration of the original "Term" for the license (i.e., as opposed to redefining the "Term" as terminating on February 27, 2028, and not February 27, 2018) as follows:

2. Extension of Term. The term of the License shall be and is hereby amended, extended and renewed for a period of **ten (10) years** (the "New Term") commencing, **February 28, 2018** and ending **February 27, 2028** unless earlier terminated as provided for herein.

(Fourth Amendment, ¶ 2; NYSCEF Doc. No. 11).

The Fourth Amendment does not provide that payment obligations for the New Term will continue notwithstanding any early termination, and does not provide any new terms with respect to termination. Rather, the Fourth Amendment merely provides that:

7. Other Terms and Conditions Remain. In the event of any inconsistencies between the Agreement and this Fourth Amendment, the terms of this Fourth

Amendment shall control. Except as expressly set forth in this Fourth Amendment, the Agreement otherwise is unmodified and remains in full force and effect. Each reference in the Agreement to itself shall be deemed also to refer to this Fourth Amendment.

(the Fourth Amendment, ¶ 7; NYSCEF Doc. No. 11; *see also*, the First Amendment, ¶¶ 2-3 [similar language]; the Third Amendment, ¶ 3 [similar language]).

AT&T sent a Notice of Early Termination (the **Notice**), dated May 12, 2012, stating:

Please be advised that pursuant to Section 9 of Schedule II to the License Agreement (the “Agreement”), AT&T Wireless Services d/b/a New Cingular Wireless hereby gives notice of early termination. The Lease Agreement will terminate as of August 31, 2012, as permitted under Section 9. All rights and obligations under the Agreement expire as of that date, except for those rights and obligations that are expressly noted to survive the termination of the Agreement.

This paragraph provides that New Cingular Wireless PCS may terminate the Agreement "Licensee may terminate the portions of this agreement related to operations at the licensed premises at any time, in its sole discretion, upon ninety (90) days written notice to Licensor, provided that Licensee's obligation to pay license fee payments during the License Term described in the amendment shall remain in full force and effect for such License Term."

(NYSCEF Doc. No. 12).

Beach Lofts now brings this action seeking (1) a declaratory judgment that AT&T is liable for payments through February 28, 2028, and (2) for breach of contract (NYSCEF Doc. No. 1).

AT&T moves to dismiss pursuant to CPLR 3211, arguing that because it terminated the License Agreement prior to the commencement of the “New Term,” as defined in the Fourth Amendment, the “New Term” never went into effect and, therefore, AT&T is not liable for any additional payments beyond the time from its termination in 2012 until the end of the initial term in 2018, which it paid. AT&T is correct. As set forth above, significantly, the Fourth Amendment’s did not redefine the “Term” to include the period terminating on February 28, 2028 – i.e., this was created as a “New Term” commencing after the expiration of the original

term, and the Second Amendment, by its terms, guaranteed license fee payments only for the term expiring on February 27, 2018. To the extent that Beach Lofts argues that once the Fourth Amendment was executed AT&T was automatically obligated to make payments through February 28, 2028, this is not supported by the very language of the Fourth Amendment which expressly states that the "New Term" will commence on February 28, 2018 and end on February 27, 2028 "*unless earlier terminated*" (Fourth Amendment, ¶ 2; NYSCEF Doc. No. 11 [emphasis added]). The court cannot, under the guise of interpretation, rewrite the parties' contract (*Himmelberger v 40-50 Brighton First Road Apartments Corp.*, 94 AD3d 817 [2d Dept 2012]). The parties expressly chose to define the term commencing February 28, 2018 as a "New Term." Previously, by way of example, the parties redefined the "Term" from a five-year period with one year automatic extensions to a an approximately ten year period. Nor may Beach Lofts avoid the inevitable result dictated by the terms of its contract by trying to create a factual issue with respect to whether AT&T surrendered the Premises because AT&T failed to return its keys to the Premises and abandoned certain unspecified equipment. These allegations even if true were not conditions required as part of AT&T's right to terminate as described above.

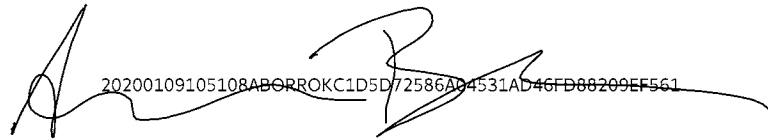
Accordingly, it is

ORDERED that the branch of the defendant's motion that seeks dismissal on the first cause of action in the complaint for a declaratory judgment with respect to the subject matter of that cause of action is granted; and it is further

ADJUDGED and DECLARED with respect to the first cause of action that the plaintiff is not entitled to any additional payments from the defendant for the "New Term" commencing, February 28, 2018 and ending February 27, 2028; and it is further

ORDERED that the branch of the defendant's motion that seeks dismissal of the second cause of action for breach of contract is granted for failure to state a claim and based on documentary evidence; and it is further

ORDERED that the Clerk of Court is directed to enter judgment accordingly upon service of notice of entry of this decision and order, together with costs and disbursements.


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1/9/2020
DATE

ANDREW BORROK, 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