

WEC 98C-6 LLC v SAKS Inc.
2020 NY Slip Op 30891(U)
March 26, 2020
Supreme Court, New York County
Docket Number: 652243/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: GENERAL IAS PART 38

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WEC 98C-6 LLC and : Index No. 652243/2018

Plaintiff, : DECISION AND ORDER

-against- :

SAKS INCORPORATED, :

Defendant. :
-----X

LOUIS L. NOCK, J.

This action, as well as related actions bearing index Nos. 652246/2018, 652247/2018, and 652250/2018,¹ are consolidated for disposition with regard to pending motions and cross-motions seeking, respectively, the same relief. Defendant renews prior motions made, in all four cases, to dismiss on *forum non conveniens* grounds (CPLR 327 [a]) (motion seq. no. 003). The prior motions (seq. no. 001) were denied without prejudice to renew, in this court’s decision and order dated March 8, 2019 (NYSCEF Doc. No. 57), entered in this action (the “Prior Decision”). Familiarity with that decision and order is presumed. Plaintiffs cross-move for summary judgment in all four cases.

As noted in the Prior Decision, the four actions involve claims for money judgments against defendant Saks Incorporated (“Saks”) on its guaranties of rent obligations by commercial tenants of shopping mall spaces located outside of the State of New York. The underlying leases and guaranties contain choice of non-New-York law clauses; and none of the parties are New

¹ All the actions are brought against the same defendant. The plaintiffs in the related actions are, separately, WEC 98C-3 LLC, WEC 98C-4 LLC, and WEC 98C-5 LLC. An additional plaintiff – Stratford Square Mall Holdings LLC – was added, through consent intervention, in case no. 652250/2018 (NYSCEF Doc. No. 105 [involving plaintiff WEC 98C-3 LLC]). A fifth action (index No. 652249/2018 [involving WEC 98C-2 LLC]) was discontinued by stipulation of the parties (NYSCEF Doc. No. 78 of said action).

York domiciliaries.² The prior motions were pre-answer motions. Thus, no affirmative defenses or counterclaims were interposed at that time. Absent any showing, at that infant stage of the cases, of any notable considerations warranting a change of venue to Illinois – the location of three of the four leased properties – this court denied the motions to dismiss, observing, at that particular point in time, that:

Simply put – the actions are about money alleged to be owed by Saks, directly and contractually, to the plaintiffs. Nothing more, and nothing less.

(Prior Decision at 1-2.)

However, this court took care to indicate that the analysis might change if, after issue was joined, affirmative defenses or counterclaims would be interposed that implicate the need for a deciding court to consider critical evidence situated in Illinois (or bordering Indiana). Thus, the Prior Decision’s denial of defendant’s dismissal motions was expressly issued without prejudice to defendant’s right to renew the motions upon the advent of any such affirmative defenses or counterclaims (*see, id.*, at 7). The instant motions presently before this court are, in fact, such renewed motions, premised on answers filed in the actions which all assert the affirmative defense of failure to mitigate damages.

The subject guaranties are expressly “governed by the laws of the State of Illinois.” Illinois requires landlords to “take reasonable measures to mitigate the damages recoverable against a defaulting lessee” (735 ILCS 5/9-213.1). This landlord’s duty inures to the benefit of the defaulting lessee’s guarantors, as well (*see, Danada Square, LLC v KFC Natl. Mgt. Co.*, 392 Ill App 3d 598 [2d Dist 2009]). Moreover, under Illinois law, it is the landlord’s burden to prove mitigation of damages under the aforesaid Illinois statute (*see, Snyder v Ambrose*, 266 Ill App 3d

² Although Saks is authorized to do business here, and maintains a presence here, it is a Tennessee corporation, as noted in the Prior Decision.

163 [2d Dist 1994]). And, consistent with said statute, the subject leases expressly mandate that: “Landlord shall use commercially reasonable efforts to relet the Demised Premises”

Factors indicative of a landlord’s adequate mitigation of its damages are identified by Illinois law as including: the retention of a building manager; the erection of rental signage upon the premises; the publishing of advertisements in local and regional media outlets; and the engagement of banking services, and of real estate rental brokers and developers (*see, MXL Indus., Inc. v Mulder*, 252 Ill App 3d 18 [2d Dist 1993]; *see also, Kallman v Radioshack Corp.*, 315 F3d 731 [7th Cir 2002]).

Papers submitted in this motion practice highlight the propensity of Illinois-based evidence – including testimonial evidence – that underlies the critical question of the lengths plaintiffs took, or did not take, to mitigate its damages in the wake of its lessees’ defaults in rent and vacatur of the leased shopping properties. For example, we now know that plaintiff dealt with a Chicago, Illinois, firm called Collateral Trustee, Inc., to market the premises. That Illinois firm, through its principal, John Suzuki, had dealt with another non-party – Starwood Retail – concerning efforts to possibly sell the property to it. And Mr. Suzuki had further dealt with the Mayor and Director of Development of Hobart, Indiana, about possible use of one of the properties as a convention center. Thus, Chicagoan John Suzuki will definitely be an important witness, as well as the above Indiana contact, in connection with the timing and efforts underlying plaintiffs’ actions or inactions relative to mitigation of their damages. Further, plaintiffs retained the CBRE real estate services firm to broker a sale of the property, through William Wright, resident in CBRE’s Chicago office. Thus, evidence to be derived from Mr. Wright concerning CBRE’s activities in Illinois will also be central to defendant’s failure-to-mitigate defense.

Similarly, as logically pointed out by defendant's submissions, efforts to market shopping mall space are typically coordinated with local governmental agencies so as to secure tax incentives for potential shopping mall tenants. Thus, such agencies may very well possess information revealing the volume of activity by plaintiffs – or lack thereof – toward attracting leasing prospects to the properties.

Perhaps most notably: we now know that the property is presently the subject of a foreclosure action in the Circuit Court of DuPage County, Illinois. John Suzuki – mentioned above – is that court's appointed receiver for the property. Mr. Suzuki prepared reports specifically addressing what he called "Leasing/Sale Activity," and describing CBRE's marketing and negotiation efforts. Again – Mr. Suzuki is in Chicago, as well as his reports and, undoubtedly, his report back-up material.

Plaintiffs' submission in opposition says nothing about the foregoing Illinois-based relevancies to the mitigation defense until 33 of its paragraphs have gone by. But even at that late point, that very submission, quite remarkably, quotes in bold script the leases' express mandate that a landlord must mitigate its damages, commensurate with governing Illinois law.

CPLR 327 (a) recognizes dismissal "where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 [1984]). The decision to do so is committed to the sound discretion of the court (*id.*, at 248). Factors include: the existence of an adequate alternative forum; the residence of the parties; the location of the relevant events; the applicability of the laws of another state; potential hardship for the defendant; the burden on the New York court; and, notably, the locus of the evidence (*id.*). The circumstances that have now been brought into relevance by virtue of the now-asserted affirmative defense of failure to mitigate – together with

the remaining factors, aforesaid – lead to the conclusion that, in this court’s sound discretion, these actions are better litigated, and proven, in Illinois (or Indiana)³ – but not New York.

Consequently, the balance of relevant factors, at this post-answer stage of the cases, militates toward this court’s discretionary conclusion that New York is not a convenient forum for these cases; but rather, that Illinois is.

Accordingly, it is

ORDERED that defendant’s motion to dismiss the actions on *forum non conveniens* grounds (CPLR 327 [a]) is granted and, accordingly, they are dismissed without prejudice to plaintiffs’ right to sue on their claims in a court of competent jurisdiction in the State of Illinois, and defendant’s right to defend same therein; and it is further

ORDERED that plaintiffs’ cross-motions for summary judgment are denied without prejudice to their right to so move within the context of an action they may choose to commence in the State of Illinois in respect of the claims asserted herein.

This shall constitute the decision and order of the court.

Dated: New York, New York
March 26, 2020

ENTER :



Hon. Louis L. Nock, J.S.C.

³ Three of the four properties are in Illinois, with the fourth in Indiana, bordering Illinois.