43-01 22nd St. Owner LLC v Reis
2020 NY Slip Op 32763(U)
August 25, 2020
Supreme Court, New York County
Docket Number: 153687/2020
Judge: Kathryn E. Freed

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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INDEX NO. 153687/2020

43-01 22ND STREET OWNER LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

JUVENAL REIS,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for DISMISS.

In this action by plaintiff 43-01 22nd Street Owner LLC to recover for unpaid use and occupancy, defendant Juvenal Reis moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. Plaintiff opposes the motion. After considering the parties' contentions, and after a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The defendant, as tenant, and J.B. Kaufman Realty Co., LLC ("JBK"), as landlord and plaintiff's predecessor-in-interest, entered into a lease for certain real property in Queens in 2002 ("the building" or "the premises"). During the ensuing years, defendant and JBK executed various letter agreements extending the terms of

the original lease and also the lease of other space in the subject building. In June 2012 the parties entered into a letter agreement ("the 2012 agreement"), which "consolidate[d] all existing letter agreements to the same expiration date" of February 28, 2015. The 2012 agreement also provided that the terms of the lease were "extended to now terminate on Feb. 28, 2030," with "terms to be determined at the expiration of this initial lease consolidation period." Additionally, according to the 2012 agreement, any annual percentage increase in rent was not to be less than five percent and was not to exceed eight percent.

Defendant and JBK thereafter had a dispute regarding whether the 2012 agreement constituted a binding contract pursuant to which defendant had the right to continue occupying the leased premises through February 2030. Despite the dispute however, defendant and JBK agreed that defendant could remain in possession of the premises until February 29, 2016, with a 6% rent increase.

In July 2015, defendant commenced an action against JBK in the Supreme Court, Queens County, styled *Reis v J.B. Kaufman Realty Co., LLC*, Ind. No. 10961/17 ("the Queens action"), seeking a judgment declaring that defendant's lease was to expire on February 28, 2030 and that annual rent increases would not be less than 5% or greater than 8%. Defendant also filed a notice of pendency with respect to the property.

The parties entered into two stipulations in the Queens action on March 17, 2016 ("the March 2016 stipulations"). The first provided, inter alia, that "during the pendency of [the Queens action]", the parties would continue to honor their respective obligations under the contested lease "as if there was no such dispute and it was therefore still in full force and effect, without prejudice to any of the rights or claims of either party." Doc. 5. The second provided that "[u]ntil the final determination or settlement of this action, [defendant] shall deliver monthly checks to [plaintiff] reflecting a 6.4% annual percentage rent increase, effective on March 1 of each year beginning March 1, 2016" and that "[t]he making and acceptance of these payments shall be without prejudice to the rights and duties of the parties under the [l]ease." Doc. 6.

In July 2016, JBK sold the building to the plaintiff herein and, pursuant to a stipulation, plaintiff was added as a defendant in the Queens action. The defendants in the Queens action then moved, inter alia, for summary judgment declaring that the lease expired on February 29, 2016 and that the notice of pendency had to be cancelled on the ground that the 2012 agreement was an unenforceable agreement to agree. The Supreme Court, Queens County denied summary judgment to plaintiff and JBK and they appealed.

By order dated March 11, 2020, the Appellate Division, Second Department reversed the denial of summary judgment to plaintiff and JBK, holding that the 2012

agreement was an unenforceable agreement to agree and that "the Supreme Court should have granted those branches of [the motion by plaintiff and JBK] which were for summary judgment declaring that the lease expired on February 29, 2016, and to cancel the notice of pendency." *Reis v J.B. Kaufman Realty Co.*, LLC, 181 AD3d 740, 741 (2d Dept 2020). The Appellate Division also remitted the matter to the Supreme Court, Queens County for the entry of a judgment declaring, inter alia, that the subject lease expired on February 29, 2016. *Id.*

On May 29, 2020, plaintiff commenced the captioned action against defendant alleging that, since defendant's lease terminated February 29, 2016, but he remained in possession through March 11, 2020, it was entitled to the difference between the fair rental value of the premises and the amount actually paid by defendant during that period of approximately 4 years. Doc. 1.

Defendant thereafter filed the instant motion to dismiss the complaint pursuant to CPLR 3211(a)(1) (documentary evidence) and (a)(7) (failure to state a cause of action). Docs. 2-3. In support of the motion, plaintiff argues that, since it has moved to reargue the order of the Appellate Division or, in the alternative, has sought leave to appeal to the Court of Appeals, there has been no "final determination or settlement of [the Queens] action" and, since no final judgment has been entered in that action, the doctrine of res judicata does not apply and the lease "is still in full force and effect" pursuant to the March 2016 stipulations. Defendant

further asserts that plaintiff is not entitled to any damages since he has paid rent in full pursuant to the March 2016 stipulations for the period of March 1, 2016 through March 11, 2020 and the statements for the period of February through April of 2020 reflect a zero balance. Additionally, defendant maintains that, since the second March 17, 2016 stipulation provided for the payment of a specific amount of rent until the "final determination or settlement" of the action "without prejudice to the rights and duties of the parties", it has no responsibility to pay any additional money for occupying the premises.

In an affidavit in opposition to the motion, Patrick Pavone, Managing Director-Acquisitions for Olmstead Properties, Inc. ("Olmstead"), a management and development company affiliated with plaintiff, states that plaintiff purchased the building from JBK. Doc. 11. According to Pavone, defendant has remained in possession of the premises and has sublet portions thereof as studio spaces for artists. Pavone further states that plaintiff invoiced defendant only for use and occupancy ("U & O) and not rent, and marked the checks "accepted without prejudice."

In a memorandum of law in opposition, plaintiff argues that, by choosing to stay in possession, defendant assumed the risk of having to pay fair market holdover U & O after the lease termination date of February 29, 2016, less any amounts already paid. Plaintiff maintains that, contrary to defendant's contention, the latter's payments were not in full and the term "without prejudice" does not preclude it from

seeking U & O from defendant above the amount of rent he paid. Further, maintains plaintiff, the doctrine of res judicata applies herein despite the fact that defendant sought leave to appeal to the Court of Appeals.

In reply, defendant argues that, since the March 2016 stipulations control the rights and duties of the parties herein, and since it has paid all rent due in accordance with those unambiguous stipulations, the complaint must be dismissed. Defendant further asserts that, although the issue of whether the lease has been terminated is now res judicata, the captioned action is premature and must be dismissed since plaintiff has no remedy until the Queens action is finally determined or settled, which it is not given his motion for reargument and application for leave to the appeal to the Court of Appeals.

LEGAL CONCLUSIONS:

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (internal citations omitted). A pleading will be dismissed if it fails to state a cause of action. *See* CPLR 3211 (a)(7). Moreover, a motion to dismiss a complaint pursuant to CPLR 3211

(a)(1) may be granted when the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law. *See Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); *Ladenburg Thalmann & Co. v Tim's Amusements,* 275 AD2d 243, 246 (1st Dept 2000).

Here, the documentary evidence relied on by defendant clearly does not utterly refute plaintiff's claim. The crux of defendant's argument is that the March 2016 stipulations set a fixed amount of rent for the period he remained in occupancy of the premises, March 2016 – March 2020, and that, since he paid this amount in full, and such payments were made "without prejudice" pursuant to the 2016 stipulations, he owes no monies to plaintiff. In response, plaintiff argues that the inclusion of the term "without prejudice to the rights and duties of the parties under the [l]ease" preserved its right to pursue from defendant the difference between the fair market rental value of the premises and the amount defendant actually paid plaintiff for occupying the premises during said period. Thus, the phrase "without prejudice" does not conclusively defeat plaintiff's claim but rather raises an issue regarding what the parties intended it to mean.

Nor is the complaint subject to dismissal for failure to state a claim, since a landlord such as plaintiff may be entitled to an award of use and occupancy based on the fair market rental value of the leased premises.

See Steve Madden Retail, Inc. v 720 Lex Acquisition LLC, 2016 NY Slip Op 31522(U), *6-7 (Sup Ct, NY County 2016) citing Real Property Law §220; *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d at 492, 499 (1983); *Split Rock Developers, LLC, v Zartab, Inc.,* 135 AD3d 845 (2d Dept 2016).

Defendant's argument that the March 2016 stipulations warrant dismissal of the complaint because there has not been a "final determination or settlement" in the Queens action is without merit. Defendant concedes that "[i]t is true of course that the Appellate Division's decision on when the [l]ease terminated is at this moment *res judicata* but it is also true that the action has not been finally determined or settled" because he is seeking leave to appeal to the Court of Appeals. Doc. 17 at par. 19. This contention is inherently contradictory because "[f]or the doctrine of res judicata to be applied, there must have been, in the prior proceeding, a final judgment on the merits (*see Brown v Lutheran Med. Ctr.*, 107 AD3d 837, 838 [2d Dept 2013]). 'An order granting a summary judgment motion is on the merits and has preclusive effect' (*Methal v City of New York*, 50 AD3d 654, 656 [2d Dept 2008])." *Bayer v City of New York*, 115 AD3d 897, 899 (2d Dept 2014). Thus, by admitting that res judicata applies "at this moment", he effectively concedes that there has been a final determination in plaintiff's favor in the Queens action. Finally, as plaintiff argues, the filing of defendant's appeal does not affect the

applicability of the doctrine of res judicata. *See Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 98 (1st Dept 2012).

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, if counsel can agree on a discovery schedule, they are directed to complete a preliminary conference order form (blank form to be emailed to counsel by the Part 2 Clerk) on or before October 5, 2020; and it is further

ORDERED that, if counsel cannot agree on the terms of a preliminary conference order, then they are to participate in a telephonic preliminary conference on October 5, 2020 at 2:30 p.m. (counsel are to provide the court with a dial-in number and access code for the call OR are to have all parties on the line and then patch the court in at (646) 386-5655); and it is further

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

8/25/2020
DATE

KATHRYN E. FREED, J.S.C.

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