BKNY 1, Inc. v 132 Capulet Holdings, LLC
2020 NY Slip Op 33143(U)
September 25, 2020
Supreme Court, Kings County
Docket Number: 508647/16
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of September, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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BKNY 1, INC d/b/a 132 LOUNGE,

Plaintiff,

- against -

132 CAPULET HOLDINGS, LLC,

Defendant.

Action No. 1
Index No. 508647/16

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BKNY 1, INC,

Plaintiff,

- against -

UNION & COURT REALTY CORP.,

Defendant.

Action No. 2
Index No. 505532/16

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MARC RYBSTEIN, As Administrator & sole remaining Heir of the ESTATE OF SYLVIA BLINCHIK,

Plaintiff,

- against -

132 CAPULET HOLDINGS, LLC, BKNY 1, INC d/b/a 132 LOUNGE and UNION & COURT REALTY CORP.,

Defendants.

Action No. 3
Index No. 515094/19

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The following e-filed papers read herein:	NYSCEF Doc. Nos.	
	Action No. 1	Action No. 2
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	522-526	49-68
Opposing Affidavits (Affirmations) Annexed	532-543	69-70

Upon the foregoing papers, plaintiff BKNY 1, Inc. d/b/a 132 Lounge (BKNY) moves, in Action No. 1 (in motion sequence [mot. seq.] 15), for an order, pursuant to CPLR 602 (a), consolidating Action Nos. 1, 2 and 3 (captioned above) for all purposes, including discovery and trial.

Defendant Union & Court Realty Corp. (Union) moves, in Action No. 2 (in mot. seq. two), for an order: (1) granting it summary judgment dismissing the amended complaint, pursuant to CPLR 3212, and (2) imposing sanctions and attorney's fees upon BKNY, pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (Part 130), and scheduling a hearing to determine the amount of sanctions and attorney's fees to be awarded.

Background

Action Nos. 1 and 2 arise from BKNY's tenancy at the mixed-use, commercial property at 132 Montague Street in Brooklyn (Property), where BKNY occupies the ground floor, basement and backyard of the Property (Leased Space), pursuant to a July 25, 2012 10-year lease with a term of November 1, 2012 through October 31, 2022 (Lease). The Lease consists of a boilerplate form lease, a Rent Schedule and a Rider.

Since 2012, BKNY operates a restaurant at the Leased Space known as "132 Lounge." BKNY originally rented the Leased Space from Union, the prior owner of the Property. Union transferred the Property to 132 Capulet Holdings, LLC (132 Capulet), pursuant to an April 7, 2016 deed.

132 Capulet, following its purchase of the Property, served BKNY with a "Thirty (30) Day Notice to Cure Default," dated April 7, 2016, setting forth various violations of the Lease provisions (First Notice to Cure). Those violations included BKNY's construction of an extension in the rear of the Property without approval from the Department of Buildings (DOB) and in violation of Administrative Code of the City of New York § 28-302.1 since the extension blocked the fire escape.

Action No. 1

On May 24, 2016, BKNY commenced Action No. 1 against 132 Capulet seeking a declaratory judgment that it is not in default under the Lease. The complaint alleges that "[a]lthough BKNY has been a model tenant and invested substantial sums of money improving the Premises, the new Landlord is determined to terminate the Lease and select its own tenant" and "the Landlord is alleging that BKNY breached various provisions of the Lease" (Action No. 1 complaint at ¶ 10). BKNY asserts two causes of action for, respectively: (1) a Yellowstone injunction to maintain the status quo pending the determination of this action on the merits, and (2) breach of BKNY's right to the use and quiet enjoyment of the Leased Space.

By an August 5, 2016 order, the court granted BKNY's application for a Yellowstone injunction.

On September 20, 2016, 132 Capulet answered the complaint, denied the material allegations therein and asserted ten affirmative defenses, including that: (1) BKNY breached the Lease by performing alteration and renovation work at the Property, "including the erection of an extension/landing . . . in the rear of the Subject Premises without . . . prior written consent"; (2) BKNY breached the Lease by failing to submit plans to 132 Capulet before erecting the extension; (3) BKNY breached the Lease by failing to obtain permits from the DOB before erecting the extension; (4) BKNY breached the Lease by failing to obtain insurance; (5) BKNY has failed to cure its breaches under the Lease; and (6) as a result of BKNY's improper construction of the extension, several violations have been issued against the Property.

132 Capulet also asserted 13 counterclaims against BKNY for, respectively: (1) an award of attorney's fees, pursuant to articles 18 and 19 of the Lease; (2) an injunction enjoining BKNY from utilizing the extension until such time as all Building Code violations have been dismissed and all necessary permits and approvals are obtained from the DOB; (3) an order requiring BKNY to remove the extension and all electrical wiring and plumbing; (4) a warrant of ejectment because BKNY continues to utilize the backyard despite 132 Capulet's revocation of BKNY's license to occupy the backyard; (5) an injunction enjoining and restraining BKNY from performing any alterations and

renovations to the Property; (6) an order directing BKNY to cure any violations and to pay any penalties and/or fines assessed against the Property; (7) property damage based on BKNY's erection of the extension; (8) monetary damages related to the cost of curing the violations issued against the Property; (9) an injunction authorizing 132 Capulet to install a water meter; (10) monetary damages to reimburse 132 Capulet for BKNY's water usage; (11) an injunction requiring BKNY to cease and desist from utilizing the Leased Space as anything but a Tapas restaurant with light cooking only, as set forth in the Lease; (12) an injunction requiring BKNY to stop having live entertainment at the Leased Space, in accordance with the Lease; and (13) an injunction requiring BKNY to stop having live entertainment in the absence of a place of assembly certificate of operation.

On November 9, 2016, BKNY replied to 132 Capulet's counterclaims and asserted six affirmative defenses, including that BKNY has a leasehold right to use the backyard and BKNY received consent to make renovations to the Leased Space.

While the Yellowstone injunction remained in effect, 132 Capulet served BKNY with an "Amended Thirty (30) Day Notice to Cure Default," dated May 19, 2017 (Second Notice to Cure). The Second Notice to Cure added to the list of the alleged violations set forth in the First Notice to Cure. The Second Notice to Cure alleged that BKNY had (1) "plac[ed] chairs and tables in the path of the fire escape to the public way in violation of Administrative Code §§ 1002 and 1027.6," and (2) failed to use "a proper 'type one' hood

and/or other ventilation that [was] capable of handling the grease and other air born particulates associated with the cooking of foods listed [in BKNY's] current menu." Consequently, by a May 19, 2017 order, the court granted BKNY a second Yellowstone injunction.

On May 17, 2019, 132 Capulet moved for partial summary judgment on its affirmative defenses and counterclaims and/or for an order vacating the Yellowstone injunction and/or scheduling a hearing on its counterclaim for attorney's fees. By a March 2, 2020 order, this court granted 132 Capulet's motion to the extent of ordering that: (1) BKNY shall arrange for one or more inspections of the Leased Space (i.e., the basement, ground floor and backyard) by the Fire Marshall, the DOB and the Department of Health, and (2) if one or more violations are issued which correlate to BKNY's claimed defaults under 132 Capulet's First and/or Second Notices to Cure, then BKNY "shall be required to forthwith diligently cure such lease violations, subject to defendant's cooperation and consent if necessary." This order is the subject of a pending motion for reargument in Action No. 2 (mot. seq. 16).

Action No. 2

On April 10, 2016, BKNY commenced Action No. 2 against Union, its prior landlord, alleging that the Lease provides that BKNY would have "exclusive use" of the Leased Space, including the backyard, that BKNY "would make all cosmetic repairs, alterations, additions, improvements and decorations '. . .necessary or desirable to make

the demised premises suitable for Tenant's use and occupancy . . .'" and that Union was responsible to repair and maintain the Property's roof and to make structural repairs (Action No. 2 complaint at ¶¶ 10, 18, 19 and 26). The complaint alleges that Union "failed and refused to abide by its obligations in the Lease to make roof and structural repairs," "refused to clean up the back yard or make repairs and/or improvements in the back yard" and "refused to compensate [BKNY] for the significant sums [it] spent in cleanup, repairs and renovations of the back yard" (*id.* at ¶¶ 22, 31 and 32).

On November 8, 2016, BKNY amended its complaint. The amended complaint asserts four causes of action against Union for: (1) breach of the Lease because the backyard of the Property is allegedly encumbered by an easement which restricts BKNY's use of the backyard; (2) breach of the Lease based on Union's failure to make roof and structural repairs and compensate BKNY for the structural repairs it made to the Leased Space; (3) fraud based on Union's allegedly false representation that BKNY would have exclusive use of the backyard for its restaurant business and Union's alleged concealment of the fact that BKNY may not have the legal right to lease the backyard space due to an easement; and (4) constructive eviction by denying BKNY exclusive use of the backyard.

On March 29, 2019, Union answered the amended complaint, denied the material allegations therein and asserted affirmative defenses, including that the recorded easement is a matter of public record, it had no duty to disclose the existence of the

easement, it granted BKNY a revocable license to use the backyard in the Lease Rider and that BKNY defaulted under the Lease by failing to obtain permits and approvals from the DOB before performing renovations to the Leased Space, resulting in violations. Union also asserted a counterclaim against BKNY for costs and attorney's fees, pursuant to articles 18 and 19 of the Lease.

Notably, BKNY failed to reply to Union's counterclaim.

Action No. 3

On July 11, 2019, Marc Rybstein (Rybstein), as Administrator and sole remaining heir of the Estate of Sylvia Blinchik (Estate), commenced Action No. 3 against 132 Capulet, BKNY and Union alleging that the Estate "owned an easement dated June 12, 1986 and filed with the Clerk of the County of Kings on February 13, 198[7] . . . over the back yard of the Premises" (Action No. 3 complaint at ¶ 2). The complaint further alleges that:

> "The easement grants plaintiff the 'perpetual use and occupancy' of the backyard area for the purpose of establishing and maintaining a memorial garden to plaintiff's father Mark Allen Blinchik and restricts the Defendants' use of the back yard to such purposes
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> * * *
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> "Defendants, in violation of the easement have rented the backyard area for a commercial purpose and have removed the memorial garden and permitted the property to fall into disrepair" (*id.* at ¶¶ 3 and 7).

Rybstein asserted four causes of action against 132 Capulet, BKNY and Union for: (1) a

declaratory judgment "setting forth his rights to enter the premises and take such steps as are necessary to restore and maintain the memorial garden . . ." and a permanent injunction "barring defendants from interfering with plaintiff's exercise of his rights under the easement . . ."; (2) monetary damages necessary to restore the memorial garden in the backyard; (3) an accounting of the rents collected for BKNY's commercial use of the backyard; and (4) infliction of extreme emotional distress.

On August 20, 2019, BKNY answered the complaint, denied the material allegations therein and asserted affirmative defenses, including that BKNY, a tenant, "was not given knowledge or made aware of an easement and is in possession of the property for commercial purposes due to the license granted by prior owner, defendant Union . . . and the rental agreement." BKNY also asserted a counterclaim for attorney's fees because the action is "frivolous and wholly without merit."

On September 23, 2019, Union answered the complaint. Thereafter, on November 15, 2019, the Estate discontinued Action No. 3, with prejudice, as against Union.

BKNY's Motion to Consolidate

BKNY now moves, in Action No. 1, for an order, pursuant to CPLR 602 (a), consolidating Action Nos. 1, 2 and 3 on the grounds that "the allegations of the complaints in the three pending actions are essentially identical"; "[t]he law to be applied is the same" and "[t]he three subject matters are premised on the same or closely related legal theories" concerning the backyard easement at the Property. BKNY asserts that "all

of the factors weigh in favor of consolidation" and "[a] failure to consolidate . . . risk[s] inconsistent adjudications on common legal issues and would burden the parties and witnesses with unnecessary and largely duplicative discovery." BKNY notes that consolidation "will facilitate witness convenience, minimize the cost of litigation, and eliminate any potential confusion and possible inconsistencies . . ."

Union, in opposition, argues that consolidation is not warranted because the three actions "involve different parties and share no material common issues of law or fact." Union contends that "[t]he causes of action, affirmative defenses and counterclaims in the three cases are largely unrelated and require different proof" and that Union is no longer a party to Action No. 3. Union argues that "[t]he discontinuance of [Action No. 3] as to Union eliminated any alleged common issue of law and fact." Union notes that "[e]ven though two of the three cases involve the same Lease, whose existence is not disputed, they involve the application of different provisions of the Lease and touch upon no common questions of fact." Union further argues that "[d]iscovery is completed in [Action No. 1] and is almost concluded in [Action No. 2], so duplicative discovery would not be avoided." In contrast, Union notes that Action No. 3 is "in the beginning stages, one of the remaining Defendants has not yet answered the complaint, and no discovery has taken place." Union contends that "[i]t would greatly prejudice [it] to have its simple case tried together with the complicated and much lengthier [Action Nos. 1 and 3]."

Union's Motion for Summary Judgment and the Imposition of Sanctions in Action No. 2

Union moves in Action No. 2 for summary judgment dismissing BKNY's amended complaint based on the terms of the Lease, the admissions of BKNY's president, Nasser Ghorchian (Ghorchian) and the moving affidavit of Union's president, Ki Hyo Park (Park). Union also seeks the imposition of Part 130 sanctions against BKNY "for knowingly filing a frivolous and perjurious complaint . . ." and an order scheduling a hearing to determine the amount of sanctions and attorney's fees to be awarded to Union.

Union argues that the first cause of action, which alleges that Union breached the Lease by not giving BKNY exclusive possession of the backyard, and the third cause of action for fraud based on Union's alleged concealment of the easement in the backyard should both be dismissed because the allegations supporting those causes of action are demonstrably and admittedly false.

Park attests that he negotiated the Lease with BKNY's representative, Bob Cruz, at which time he advised Cruz that the backyard has an easement. According to Park, "[b]ecause Cruz insisted that he wanted to be able to use the back yard as much as the easement would allow, my attorney added the clause entitled "BACK YARD AREA" to the bottom of page 9 of the [Lease] Rider" which provides that "Landlord grants a License to Tenant for the use of the back yard in conjunction with its restaurant business."

Park further testified that "[w]hen I sold the Real Property in April, 2016, [BKNY] was still in business and was using the back yard as part of its restaurant." Union notes that Ghorchian, at his deposition, specifically admitted that BKNY had exclusive use of the backyard with Park's knowledge and consent, and without Union's interference, during the entire time that Union owned the Property.

Union contends that the second cause of action for breach of the Lease based on Union's alleged failure to make roof and structural repairs and compensate BKNY for the structural repairs it made to the Leased Space should be dismissed. Union asserts that the Rider to the Lease explicitly provides that it was BKNY's responsibility to make all repairs, alterations and improvements or other work to the Leased Space for its use as a restaurant "at its sole cost and expense." Union notes that the Lease contains no provision requiring it to do "structural" work on the Leased Space, and that the Lease explicitly provides that BKNY accepts the Leased Space in "as is" condition. In addition, Union asserts that Ghorchian admitted at his deposition that he never demanded that Union clean up the backyard or reimburse BKNY for any structural repairs.

Union contends that the fourth cause of action, which alleges that Union constructively evicted BKNY by denying it exclusive use of the backyard, should also be dismissed. Union argues that BKNY has failed to allege any facts showing that it interfered with BKMY's enjoyment and undisturbed possession of the Leased Space, or deprived BKNY from using, or forced BKNY to abandon, any part of the Leased Space.

When Ghorchian was asked at his deposition how Union prevented BKNY from using the backyard, he testified that Union sent BKNY a DOB violation requiring BKNY to remove the extension in the backyard. Ghorchian conceded, however, that the DOB never advised him that once the extension was removed he cannot use the backyard. Union asserts that BKNY has "conceded that no constructive eviction took place."

BKNY, in opposition, submits a vague affidavit from Ghorchian, who contends that Union's summary judgment motion should be denied because there are issues of fact. Ghorchian contends that Park's alleged conversation with Cruz regarding the easement is inadmissible hearsay and, "[u]on information and belief, Mr. Cruz was never an authorized representative of BKNY . . . He was not an employee, shareholder, or officer. He is not a real estate broker or attorney." BKNY also argues that sanctions are not warranted because "[w]hile [Ghorchian] may have misunderstood questions asked of him at a deposition there is no indication that any mis-statements were willful or intentional."

Discussion

(1)

BKNY's Motion to Consolidate

"A motion for consolidation is addressed to the sound discretion of the court, and absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of law and fact" (*RCN Constr. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 777 [2006]). "A motion to consolidate should be granted

absent a showing of prejudice to a substantial right by a party opposing the motion" (*Hanover Ins. Group v Mezansky*, 105 AD3d 1000, 1001 [2013]).

Here, consolidation is not warranted because BKNY has not demonstrated that Action Nos. 1, 2 and 3 involve common questions of law and fact. Furthermore, discovery has been completed in Action No. 1 and is nearly complete in Action No. 2 since both of those actions were commenced in 2016. In contrast, Action No. 3, which was recently commenced in 2019, is in its infancy and the parties have not yet begun discovery. Union, which is no longer a party to Action No. 3, would be prejudiced if it were required to wait for a joint trial after the conclusion of discovery in Action No. 3. Consequently, in this court's discretion, BKNY's motion to consolidate Action Nos. 1, 2 and 3 warrants denial.

(2)

Union's Summary Judgment Motion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and thus, should only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010]).

Here, Union established its entitlement to summary judgment dismissing the amended complaint based on the terms of the Lease, Park's affidavit testimony and Ghorchian's deposition testimony, all of which prove that BKNY had uninterrupted use and occupancy of the backyard throughout the time that Union owned the Property. Indeed, Ghorchian admitted at his deposition that BKNY had exclusive and uninterrupted use of the backyard. Thus, there is no basis for the first (breach of the Lease), third (fraud) and fourth (constructive eviction) causes of action, all of which are based on false allegations that Union prevented BKNY from using the backyard. Furthermore, under the plain terms of the Lease, BKNY took the Leased Space in "as is" condition, BKNY was solely responsible for any renovations, structural repairs or other work to the Leased Space and BKNY does not dispute these facts in its opposition papers. Consequently, the second cause of action for breach of the Lease based on Union's alleged failure to reimburse BKNY for structural work is also subject to dismissal.

Ghorchian's vague and conclusory affidavit suggesting "upon information and belief," but not attesting affirmatively, that Cruz was not an authorized representative of BKNY, fails to raise an issue of fact for trial regarding the backyard easement, which was a matter of public record. Ghorchian's affidavit "raised only feigned issues of fact designed to avoid the consequences of his prior testimony, and [is] insufficient to defeat the motion for summary judgment" (*Colucci v AFC Const.*, 54 AD3d 798, 799 [2008]).

Union has failed to establish any grounds to impose Part 130 sanctions herein.

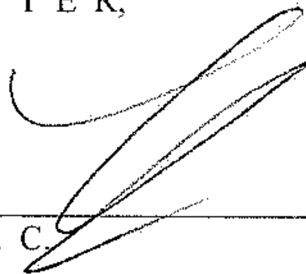
Accordingly, it is hereby

ORDERED that BKNY's motion in Action No. 1 (in mot. seq. 15) to consolidate Action Nos. 1, 2 and 3 for all purposes, including discovery and trial, is denied; and it is further

ORDERED that Union's motion in Action No. 2 (in mot. seq. two) is resolved by granting Union summary judgment dismissing the amended complaint against it, and that branch of the motion seeking Part 130 sanctions is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

Justice Lawrence Knipel