

Jacob Post, Inc. v Samuel Hampton, LLC

2020 NY Slip Op 35460(U)

September 17, 2020

Supreme Court, Nassau County

Docket Number: Index No. 609514/2017

Judge: Julianne T. Capetola

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This opinion is uncorrected and not selected for official publication.

At a term of the Supreme Court of the State of New York, held in and for the County of Nassau, at 100 Supreme Court Drive Mineola, NY 11501, on the 17th day of September 2020

PRESENT:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

.....X

JACOB POST, INC.

Plaintiff,

- against -

SAMUEL HAMPTON, LLC,

Defendant.

..... X

DECISION AND ORDER ON MOTION
Index No: 609514/2017
Motion Sequence: 002, 003

The following papers were read on Motion Sequence 002:
Defendant's Notice of Motion and Supporting Documents
Plaintiff's Affirmation in Opposition and Supporting Documents
Defendant's Reply Affirmation

The following papers were read on Motion Sequence 003:
Plaintiff's Notice of Motion and Supporting Documents
Defendant's Affirmation in Opposition and Supporting Documents
Plaintiff's Reply Affirmation

Defendant has moved by notice of motion for an order pursuant to CPLR §3212 granting them summary judgment and, in accordance therewith, for dismissal of the complaint. Plaintiff has opposed and Defendant replied. Plaintiff has moved separately for an order pursuant to CPLR §3025(b) granting them leave to amend the complaint. Defendant opposed and Plaintiff replied. Pursuant to A.O. 157/20, a conference was held via Skype for Business on August 31, 2020 pursuant to the virtual court protocols as a result of the ongoing impact of the Covid-19 pandemic on Court operations. The motions were deemed submitted at the conclusion thereof.

Although the motion seeking leave to amend the complaint was filed second in sequence, it must be addressed first.

The underlying complaint is an action to set aside a tax deed issued by the

Nassau County Treasurer in favor of the Defendant. Plaintiff seeks to amend the complaint to add a new party plaintiff and to add an additional cause of action.

A determination whether to grant leave to serve an amended pleading lies within the broad discretion of the trial court. *Nanomedicon v Research Foundation of State University of New York*, 129 A.D.3d. 684, 685 (2d Dept 2015); *Congel v Malfitano*, 84 A.D.3d. 1145, 1146 (2d Dept 2011). Although leave to amend a pleading should be freely granted in the absence of prejudice or surprise to the opposing party, leave should be denied where the proposed amendment is palpably insufficient or patently without merit. CPLR §3025(b), *Pedote v Kelly*, 124 A.D.3d. 855, 856 (2d Dept 2015).

The party plaintiff which Plaintiff seeks to add in their proposed amended summons and complaint is In His Hands, Inc. (hereinafter "IHH"). Plaintiff argues that IHH is necessary party in that, at the time of the issuance of the subject Treasurer's Deed, IHH was leasing the subject property from Plaintiff pursuant to a ten year lease, and that, in connection with the lease, IHH made leasehold improvements to the subject property costing in excess of \$125,000.00. They argue that, as the occupant of the subject property, IHH was not properly served with a notice to redeem, and therefore the Treasurer's Deed is invalid and must be set aside. They further argue that IHH is entitled to monetary damages for unjust enrichment related to the leasehold improvements from which they claim Defendant benefitted upon Defendant's taking possession of the property as well as profits Defendant has earned from the property, and for the value of their lost lease which was originally for ten years, but contemplated therein two additional ten year terms for a total of thirty (30) years.

Defendant argues that the amended is complaint is devoid of merit with respect to addition of IHH as a party plaintiff for multiple reasons. First, Defendant argues that IHH was properly served with notice to redeem by certified mail as Occupant/Tenant and that the certified mail was received and signed for. Defendant has annexed to their motion papers copies of the certified mail receipt and the completed and signed return receipt.

Defendant further argues that, assuming arguendo that IHH had not received, or been properly sent a notice to redeem, the Treasurer's Deed would still be valid but that IHH's interest as occupant would survive the conveyance. Additionally, Defendant argues that, though their interest would survive the conveyance, the leasehold interest was terminated. Defendant attaches to their moving papers a copy of an order of the Honorable James M. Darcy from the Nassau County District Court Landlord and

Tenant part dated January 29, 2018 which grants possession of the subject property to Plaintiff, lists IHH as a Respondent debtor, grants Plaintiff a monetary judgment against IHH, and ordered a warrant of eviction removing IHH from the property.

With respect to the tenant improvements claimed by IHH, Defendant notes that the Lease between Plaintiff and IHH states at Section 11.03 that,

"All Tenant's Changes shall be deemed to have attached to the leasehold and to have become the property of Landlord upon such attachment. Upon the termination of this Lease, Tenant shall not remove any of such Tenant's Changes except that Tenant shall have the right to remove (and shall be obligated to remove, upon Landlord's request) trade fixtures and furnishings installed by Tenant. Tenant shall repair any damage to the Property and the Building caused by such removal. Notwithstanding the foregoing, if prior to the end of the Term, Landlord shall notify Tenant that Landlord desires Tenant to remove from the Building any or all installations of a permanent nature made by Tenant within or to the Property which are not capable of removal without material injury to the Property or the Building or leasehold fixtures installed by Tenant in the Building (including, without limitation, Tenant's Work), Tenant shall do so at Tenant's expense. If Tenant does not remove its trade fixtures from the Property by the last day of the Term, the trade fixtures shall be deemed abandoned and Landlord shall have the right to take legal title to same, or to dispose of same, at Tenant's cost and expense, without further notice to Tenant. Tenant, at its expense, shall repair any and all damage to the Property and/or the Building caused or revealed by the removal of trade fixtures or other installations removed or removable by Tenant as described in this Section 11.03; such repair shall include the repair of holes caused by sign installation".

Therefore, IHH's claim regarding the tenant improvements is devoid of merit as the tenant improvements would belong to Plaintiff and not IHH as a result of the termination of the lease.

Regarding any claims by IHH for monetary damages, Defendant argues that same is barred as a result of the Chapter 7 bankruptcy proceeding commenced by IHH. In IHH's pleadings in the bankruptcy action, annexed to Defendant's moving papers, IHH did not list as an asset any interest in the lease or any tenant improvements to the subject property. Notably, Defendant herein is listed as a creditor in IHH's bankruptcy filing.

In accordance with all the foregoing, Plaintiff's application to amend the complaint to add IHH as a party plaintiff is denied as that portion of the requested amendment is patently without merit.

Plaintiff also seeks to add a cause of action which claims that the issuance of the Treasurer's Deed in this case constitutes an unconstitutional taking in violation of the Takings Clause of the Fifth Amendment. As correctly pointed out by Defendant in their opposition papers, to suggest that the issuance of a Treasurer's Deed would constitute a taking in violation of the Takings Clause would require a finding by this Court that the entire statutory scheme pertaining to tax liens and tax deeds for Nassau County is unconstitutional. It is well-settled that such is not the case, and therefore the application to amend the complaint to include this cause of action is patently without merit. *See, e.g. Facchin v Pekich*, 232 A.D.2d 447 (2d. Dept. 1996).

Accordingly, the motion to amend the complaint is hereby denied in its entirety.

Defendant has moved for summary judgment and dismissal of the complaint pursuant to CPLR §3212, which states, in relevant part, that a motion for summary judgment shall be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party".

"The standards regarding summary judgment motions are familiar and fundamental. The party moving for summary judgment 'bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law' (*Holtz v Niagara Mohawk Power Corp.*, 147 A.D.2d 857, 858). Once such a showing has been established, the 'burden is shifted to the opposing party to come forward with proof in evidentiary form to show the existence of genuine triable issues of fact' (*Mahar v Mahar*, 111 A.D.2d 501, 502; *see also, Ferber v Sterndent Corp.*, 51 N.Y.2d 782; *Cusano v General Elec. Corp.*, 111 A.D.2d 557). General conclusory statements, expressions of hope, and repetition of the allegations in the pleadings do not constitute evidentiary proof substantiating the party's claim and, therefore, are insufficient to defeat a summary judgment motion". *Fresh Meadows Country Club v. Lake Success*, 158 A.D.2d 581 (2d. Dept. 1990).

Defendant asserts that there are no triable issues of fact in that the taxes in question were unpaid, the tax lien was duly sold to Defendant, notice was sent and received, and the property was properly deeded to Defendant. Defendant notes that Plaintiff does not dispute that the taxes were not paid, the tax lien was not redeemed, and does not dispute the validity of the tax lien sale.

Plaintiff has opposed the motion on two grounds, to wit, that IHH was not

served with a copy of the Notice to Redeem, and that Plaintiff has moved to amend the complaint. First, it has already been determined that IHH is not necessary party plaintiff, that they were sent a copy of the Notice to Redeem in any event, and further, that the failure to have sent them a copy of the Notice to Redeem would not serve as a basis to invalidate the Treasurer's Deed. Second, as Plaintiff's motion to amend the complaint has been denied, this argument does not serve as a basis to deny the motion for summary judgment. Plaintiff has failed to oppose the motion on valid legal grounds and therefore the motion must be granted.

Accordingly, it is hereby:

ORDERED, that Plaintiff's motion seeking leave to amend the complaint is hereby denied in its entirety; and it is further

ORDERED, that Defendant's motion for summary judgment is hereby granted in its entirety and the complaint filed under Index #609514/2017 is hereby dismissed.

Defendant shall serve a copy of this order upon Plaintiff within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

Date: 9/17/2020



HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED

Sep 21 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE