

Piecraft Wantagh LLC v Willow Wood Assoc., L.P.
2020 NY Slip Op 35786(U)
May 11, 2020
Supreme Court, Nassau County
Docket Number: Index No. 603816/18
Judge: Jack L. Libert
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SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

PIECRAFT WANTAGH LLC,

Plaintiff,

-against-

WILLOW WOOD ASSOCIATES, L.P.,

Defendant/Counterclaim Plaintiff,

-against-

**THOMAS CORNING, CHRISTOPHER DOLAN, SHAWN
ZIMBERG,**

Counterclaim Defendants.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2
Reply Affidavits.....3
Memorandum of Law.....4

Defendant moves for summary judgment pursuant to CPLR §3212 for summary judgment (Motion #4). Plaintiff cross moves for the same relief (Motion # 5).

Piecraft was a tenant in defendant's shopping center located in Wantagh, New York pursuant to a written lease. Counterclaim Defendants are guarantors of the Piecraft's obligations under that lease. Prior to the commencement of the instant proceeding, defendant brought a summary proceeding for non-payment in Nassau County District Court. By order dated April 5, 2018, this court removed the summary proceeding and consolidated it with the case at bar. In accordance with a stipulation between the parties dated December 21, 2018, the plaintiff surrendered possession of the subject premises. The stipulation states "All rights of the parties are presented for disposition in this Court.including defendant's claims against the guarantors herein."

The demised premises was occupied by a pizza restaurant operated by plaintiff. The restaurant

sustained substantial water damage as a result of a leak which first appeared in the ceiling. Plaintiff alleges that the leak was caused by the active negligence of defendant in failing to maintain certain interior water piping that was landlord's responsibility. Plaintiff further alleges that defendant refused to repair the damage in breach of its obligations under the lease. Defendant alleges that the leak occurred in that portion of the premises that is solely tenant's responsibility. Defendant further alleges that it has no responsibility for the repair of any portion of the demised premises and that in any event the leak emanated from piping that was installed by plaintiff.

Summary judgment is a drastic remedy and should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (*Hantz v. Fleischman*, 155 A.D.2d 415 [2nd Dept. 1989]). The proponent of a summary judgment motion "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" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]).

In support of its motion Defendant offers the affidavit of Karen Siegel, its property manager. Ms. Siegel avers (consistent with her deposition testimony) that plaintiff "did extensive build-out work before opening including plumbing and sprinkler work. She concludes that if there was "a burst water pipe, the responsibility for that was with the tenant, PieCraft by reason if [sic] its failure to insulate and maintain the pipe". Several witnesses offered deposition testimony supporting the conclusions of Ms. Siegel. Gonzalo Farina, an employee of EW Howell testified that he was sent to the store to investigate the leak. He testified that the water was coming from burst sprinkler heads) located in the interior portion of the premises and affixed to pipes that were not insulated (Plaintiff's Exhibit J, at pp. 10,11,33. Vincent Matassa, a general contractor testified that he was called by defendant Dolan. Dolan told Matassa that "there was a problem with a sprinkler head." Matassa contacted Capitol Sprinkler Service and was present when they arrived. He did not observe whether or not any pipes had burst, including those pipes feeding the sprinkler heads (Plaintiff's Exhibit M, at pp. 10,11,33 at p.20).

David Geonie, the service manager of Capitol Sprinklers was the person that repaired the leak. He testified that he was contacted by an individual associated with PieCraft and was asked to say that a pipe had burst. "Can you put in writing when you did the repair and there was a domestic water line that broke and water got on the sprinkler head which froze and made the head break" (Plaintiff's Exhibit P, at

pp. 12,13). “No, there is no way I can do that. Because I did not see it and that is a lie. I am not getting involved in that” (, *Id.* at p. 14).

Paragraph 27.1 of the lease states, in pertinent part:

“Lessee shall, at its own cost and expense, take good care of and make necessary repairs to the interior of the Demised Premises, and the fixtures and equipment in and /or serving the Demised Premises and appurtenances thereto, including the interior wall, plumbing and partitions . . .”

According to the deposition testimony, whether the leak came from a sprinkler head or a domestic water pipe, there is no suggestion that it was located anywhere other than the interior of the demised premises. Plaintiff has set forth a *prima facie* case for summary judgment.

Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Plaintiff and counterclaim defendants set forth no evidence supporting their position that there are issues of fact. But plaintiff asserts that terms of the lease mandate an award of summary judgment to them. The cross movants rely on interpretation of Article 41 of the lease, which is set forth below:

ARTICLE 41

DESTRUCTION

41.1 If the Demised Premises shall be partially damaged by any *casualty* insured under the Lessor's insurance policy, Lessor shall, upon receipt of the insurance proceeds, repair the Demised Premises to substantially the same condition and state in which said Demised Premises were when originally delivered by Lessor to Lessee under Exhibit "B" herein, but only to the extent of the net insurance award made available to Lessor for the purposes of such repair. Lessee shall restore all improvements made by Lessee at Lessee's cost and expense. The Minimum Annual Rent shall be abated proportionately as to that portion of the Demised Premises rendered untenable. If the Demised Premises (a) by reason of such occurrence is rendered wholly untenable, or (b) should be damaged as a result of a risk which is not covered by Lessor's insurance, or (c) should be damaged in whole or in part during the last three years of the term, or (d) the Building, whether the Demised Premises is damaged or not, or all of the buildings which then comprise the Shopping Center should be damaged to the extent of thirty-five (35%) percent or more of the then monetary value thereof, or (e) if any or all of the buildings or Common Area of the Shopping Center cannot, in the sole judgment of Lessor, be operated as an integral

unit, then or in any of such events, Lessor may either elect to repair the damage or may cancel this Lease by notice of cancellation given within 180 days after such event, and thereupon this Lease shall expire, and Lessee shall vacate and surrender the Demised Premises to the Lessor. Lessee's liability for rent upon the termination of this Lease shall cease as of the day following the event or damage. In the event Lessor elects to repair the damage insurable under Lessor's policies, any abatement of rent shall end upon the earlier of (i) the date that Lessee reopens for business or (ii) the date that is thirty (30) days subsequent to the date the Lessor shall complete the restoration of the Demised Premises to the same condition in which they were when originally delivered by Lessor to Lessee, but only to extent Lessor is required to restore as provided in the first sentence of this Article 41. Unless this Lease is terminated by Lessor, Lessee shall refixture and restock the Demised Premises in a manner and to at least a condition equal to that existing prior to its destruction or *casualty*, and the proceeds of all insurance carried by Lessee on its property shall be held in trust by Lessee for the purpose of said repair and replacement.

41.2 Unless this Lease is terminated by Lessor, Lessee shall refixture and restock the Demised Premises in a manner and to at least a condition equal to that existing prior to its destruction or *casualty*, and the proceeds of all insurance carried by Lessee on its property shall be held in trust by Lessee for the purpose of said repair and replacement. (Emphasis supplied).

Citing *Madison Hill Corp. v Continental Baking Co.*, 21 A.D.2d 538, 251 N.Y.S.2d 300 (Second Dept., 1964), plaintiff asserts that the only way Article 41 makes sense is to include in the definition of “casualty” an event such as the one that occurred at PieCraft. The undersigned disagrees.

Madison Hill Corp. (*supra.*) concerned the interpretation of two lease clauses similar to the ones in dispute in the case at bar (Article 17 and Article 41). The issue of which provision prevailed arose out of a damage due to a defective roof installation. Paragraph 6 of the lease dealt with tenants obligation to repair and maintain the demised premises (like Article 17 in the case at bar). Paragraph 8 dealt with the responsibilities of the parties in the event of a casualty such as “fire, or as a result directly or indirectly of war, or by act of God, or by reason of any other cause whatsoever”(like Article 41 in the case at bar) *Id.* . The tenant argued in *Madison Hill* (as tenant does here) that the damage resulting from the faulty roof constituted a casualty. “[T]he tenant argues that the words ‘any other cause whatsoever’ is broad enough to include any and all repairs, regardless of causation.” *Id.* The court held, “we conclude that paragraph 8 refers only to casualty repairs. Such conclusion is required because the principle of *ejusdem generis* must be here applied (*Traylor v. Crucible Steel Co.*, 192 App. Div. 445, 449, *affd.* 232 N. Y. 583). Furthermore, to adopt the tenant's construction would in effect render paragraph 6 a nullity. Under

such construction the tenant under this net lease would then be absolved from any obligation to make any repairs--however caused” (*Id.*).

In the case at bar, adopting plaintiff’s construction of Article 41 would render paragraph 27 meaningless. Its argument that it is entitled to summary judgment as a matter of law is not meritorious. Likewise, plaintiff has not met its burden of proving by credible evidence a triable issue of fact. Defendant is entitled to summary judgment on the issue of liability. An inquest must be held in order to ascertain the damages.

It is,

ORDERED that defendant’s motion is granted to the extent that it is awarded summary judgment as to liability; and it is further

ORDERED, that plaintiff file a note of issue with the Calendar Control Part within 30 days after that filing is permitted under the interim rules of the court established as a result of the Covid-19 pandemic; and it is further

ORDERED, that subject to the approval of the Justice there presiding at a date to be determined by that Justice this matter shall appear in the Calendar Control Part for inquest; and it is further

ORDERED, that a copy of this order shall be served on the calendar clerk and accompany the note of issue when filed. The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the hearing.

This constitutes the decision and order of the court.

DATED: May 11, 2020

ENTER

Jack L. Libert

HON. JACK L. LIBERT

J. S.C.

ENTERED

May 14 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**