

Mollaney LLC v 574 9th Ave. Rest Corp
2021 NY Slip Op 30699(U)
March 4, 2021
Supreme Court, New York County
Docket Number: 655306/2020
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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MOLLANEY LLC,

Plaintiff,

- v -

574 9TH AVE. REST CORP A/K/A DAVE'S TAVERN,

Defendant.

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INDEX NO. 655306/2020
MOTION DATE 03/03/2021
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The motion by plaintiff to amend its complaint to add a cause of action and for rent pendente lite is granted in part.

Background

In this commercial landlord-tenant case, plaintiff (the landlord) seeks to amend the complaint to add a cause of action based on defendant 574 9th Ave Rest Corp aka Dave's Tavern ("Tenant")'s failure to maintain insurance pursuant to the lease. Plaintiff claims that after the preliminary conference, plaintiff saw a letter addressed to defendant that defendant's insurance policies were to be terminated on January 20, 2021.

Plaintiff also seeks an order that defendant pay rent pendente lite and pay rent from when defendant stopped paying rent. It alleges that it sent a fifteen-day notice to cure to defendant on August 20, 2020 due to defendant's failure to pay rent and defendant did not make any

payments. Plaintiff then contends it served a five-day notice of cancellation on October 12, 2020.

In opposition, defendant claims that the branch of the motion for leave to amend should be denied because it serves no legitimate purpose. It argues that under the lease, the failure of the Tenant to secure insurance is not a material non-curable breach. Defendant argues that plaintiff's remedy where defendant fails to secure insurance is to get insurance and then charge defendant. Defendant also claims that it should not have to pay rent *pendente lite* because its restaurant has been decimated by the ongoing pandemic

In reply, plaintiff observes that defendant did not dispute that it failed to maintain insurance. It also argues that it is entitled to an order directing defendant to pay rent *pendente lite* because defendant has not paid rent in many months.

Leave to Amend

“[L]eave to amend pleadings should be freely granted in the absence of prejudice or surprise” (*Sepulveda v Dayal*, 70 AD3d 420, 421, 893 NYS2d 549 [1st Dept 2010]). However, the amended pleading must state a valid cause of action (*id.*).

Here, the Court grants this branch of the motion. The Court observes that plaintiff need only state a cause of action; maintaining an insurance is a requirement of the lease (NYSCEF Doc. No. 34, ¶ 47) and plaintiff claims that defendant breached that obligation

Defendant's claim that the landlord was supposed to get insurance and then bill defendant is misplaced because the lease provides that the landlord “may” take such action. It does not require plaintiff to get insurance if defendant let it lapse. However, the Court observes that granting leave to amend is not the same as finding that defendant complied with various notice

requirements (if any applied) pursuant to the terms of the lease and the Court makes no findings as to the merits of the cause of action. The Court simply finds that breaching the lease is a valid cause of action and, because there is no prejudice or surprise, leave to amend is granted.

Pendente Lite

A “court has broad discretion in awarding use and occupancy pendente lite” (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124, 710 NYS2d 890 (Mem) [1st Dept 2000]).

Defendant does not dispute that it is not paying the rent while it continues to operate its restaurant, albeit in a limited capacity. Therefore, the Court finds that defendant must pay the monthly rent payment of \$15,381.83 starting on April 1, 2021 and continue to make such payments each month during the pendency of this action.

The Court declines to issue an order directing defendant to make payments for rent that may have previously accrued—that is part of the ultimate relief plaintiff seeks in this case (payment of rent). To the extent that plaintiff sought a judgment for previous rent due, that relief is denied as plaintiff did not expressly move for summary judgment.

Accordingly, it is hereby

ORDERED that the motion by plaintiff is granted to the extent that defendant shall pay \$15,381.83 per month starting on April 1, 2021 throughout the pendency of this action; and it is further

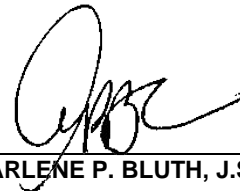
ORDERED that the branch of the motion by plaintiff for leave to amend is granted, plaintiff shall upload the proposed amended pleading (NYSCEF Doc. No. 35) as a separately e-filed document, and defendant shall answer pursuant to the CPLR; and it is further

ORDERED that plaintiff’s remaining requests for relief are denied.

Remote Conference: April 29, 2021 at 11:00 a.m.

3/4/2021

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: