Shadowbox Holdings LLC v Panasia Estate Inc.
2021 NY Slip Op 30917(U)
March 23, 2021
Supreme Court, New York County
Docket Number: 650815/2016
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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SHADOWBOX HOLDINGS LLC

Plaintiff,

- v -

PANASIA ESTATE INC.,

Defendant.

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INDEX NO. 650815/2016

MOTION DATE 02/28/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 98, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 128, 129

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Panasia Estate Inc.'s (the **Landlord**) motion for summary judgment must be granted because Shadowbox Holdings, LLC (the **Tenant**) failed to meet its obligations under Section 47 of the Lease (hereinafter defined) to obtain a temporary certificate of occupancy for the Tenant's particular use under the Lease and has not continued to diligently prosecute the Board of Standards and Appeals (**BSA**) approval process. Indeed, incredibly in opposition to the Landlord's motion for summary judgment, the Tenant submits a certificate of occupancy for a different building and a different tenant. For the avoidance of doubt, the Tenant's cross-motion is denied.

The Relevant Facts and Circumstances

Reference is made to a Lease (the **Lease**; NYSCEC Doc. No. 110), dated September 25, 2014, by and between the Landlord and the Tenant, pursuant to which the Tenant leased a portion of

the ground floor of a building at 28 West 20th Street a/k/a 33 West 19th Street, New York, New York to operate a gym, health, and fitness club (the **Premises**). The Tenant was permitted to construct a gym and fitness club facility provided that the Tenant complied with all Legal Requirements (as such term is defined in the Lease) (*id.*, §§ 5, 6H, 9A) including, without limitation, Sections 24-203 Unreasonable Noise, 24-218 General Prohibitions, 24-231 Commercial Music, and 24-232 Allowable Decibels of the Administrative Code of the City of New York (the **Noise Code**; *id.*, § 4H). Because the Tenant intended to use the demised space as a gym and such use required a change in its permitted use under applicable legal requirements, the parties agreed that (x) the Tenant would install necessary soundproofing to prevent vibrations and noise in violation of the Noise Code (*id.*, § 6B) and, (y) most importantly, pursuant to Section 47 of the Lease, the Tenant agreed that its failure to pursue and diligently prosecute a change of the permitted use of the Premises would constitute a default under the Lease:

> Tenant shall not at any time use or occupy the Premises in violation of the certificate of occupancy issued for the Premises or for the Building, if any. Landlord acknowledges Tenant may elect to pursue and diligently prosecute a BSA approval process to cure a potential violation of the certificate of occupancy. ***Failure by Tenant to pursue and diligently prosecute such BSA approval process shall be considered a default in the fulfillment of a covenant of this Lease and Landlord shall have the right to terminate this Lease immediately,*** and in addition thereto shall have the right to exercise any and all rights, privileges and remedies given to Landlord by and pursuant to the provisions of Article 20 hereof or otherwise. Landlord represents there is currently no certificate of occupancy for the Building and an ALT-1 is pending. Landlord agrees, as a condition to the Commencement Date to amend the ALT-I to permit retail uses in the Premises.

(*id.*, § 47).

In the event that the Landlord was sued by the Tenant regarding the Tenant's default under the Lease, the Tenant was required to pay the Landlord's costs and reasonable attorneys' fees incurred in such litigation (*id.* § 23).

The Tenant took possession of the Premises in November 2014 and proceeded to perform an initial build-out and construction which cost more than $1 million (the **Construction**) (NYSCEF Doc. No. 115, ¶¶ 6-10). The Tenant claims that its costs and expenses were increased and it was not able to open until May 2015 due to the Landlord's alterations and changes to the Tenant's plans and specifications (*id.*, ¶ 10).

On or about December 2015, the parties unsuccessfully discussed Tenant leasing the cellar space (*id.*, ¶ 16) which space was affected (as discussed below) by Tenant's particular use and occupancy. On January 28, 2016, Landlord served Tenant with a Fifteen (15) Day Notice of Default and Opportunity to Cure (the **Notice to Cure**: NYSCEF Doc. No. 9), pursuant to which Landlord declared Tenant in default of Sections 4, 5, 6, 9, and 47 of the Lease – i.e. the Tenant's failure to obtain a change in use to the certificate of occupancy and provide adequate soundproofing.

On February 16, 2016, the Tenant sued and moved by order to show cause for a Yellowstone Injunction on February 17, 2016, which motion was granted on the record following oral argument on July 6, 2016 (7/6/2016 Tr., NYSCEF Doc. No. 48).

On June 13, 2016, the Tenant filed an Amended Complaint alleging claims for: (1) a permanent injunction, (2) a positive injunction, (3) a declaratory judgment that the Tenant is not in default of the Lease, (4) a declaratory judgment that the Notice of Cure is void, (5) breach of covenant of quiet use and enjoyment, and (6) breach of the implied covenant of good faith and fair dealing (NYSCEF Doc. No. 32). On July 12, 2016, the Landlord filed its Answer with counterclaims for: (1) costs and attorneys' fees, (2) a permanent injunction compelling the Tenant to install the necessary soundproofing, (3) loss of rental income from the cellar space, and (4) trespass (NYSCEF Doc. No. 45).

Subsequently, on October 26, 2020, the Tenant filed a petition for bankruptcy on October 26, 2020 (NYSCEF Doc. No. 126). Pursuant to a Stipulation and Order, dated January 22, 2021, the automatic stay pursuant to § 362 of the Bankruptcy Code was modified to permit the parties to have the instant motion resolved (NYSCEF Doc. No. 129).

Discussion

On a motion for summary judgment, the movant "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 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opposing party must then "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" that its claim rests upon (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

A. Declaratory Judgment (Third and Fourth Causes of Action)

As discussed above, the Lease provides that the Tenant would "diligently prosecute a BSA approval process to cure a potential violation of the certificate of occupancy" and that failure to do so would constitute a default (NYSCEF Doc. No. 110, § 47). This was a necessary step to convert the use of the Premises from a store to a physical cultural establishment, for which a boxing studio would be a lawful use. As of April 12, 2016, the New York City Department of Buildings Application Details for the Premises indicated that the Tenant's Plan Exam was disapproved and that an amended certificate of occupancy had to be obtained (NYSCEF Doc. No. 92, Exh. I). Daniel Glazer, Tenant's CEO, explained that a temporary certificate of occupancy for retail use of the Premises was in place as of June 7, 2019, but that the Tenant had not completed the final BSA process to obtain a physical culture establishment use designation (NYSCEF Doc. No. 92, Exh. G at 18:2-9, 21:11-19). The Tenant has not obtained BSA approval or a certificate of occupancy to date and on the record before the court does not appear to be diligently pursuing the same. Thus, the Landlord has met its prima facie burden in demonstrating that the Tenant is default.

In its opposition papers, the Tenant fails to raise a material issue of fact to demonstrate its meaningful continued efforts to obtain the change in use which would be required for it to operate as a boxing studio as the Lease requires. As discussed above, in its opposition papers, the Tenant offers a certificate of occupancy for 31 West 19th Street which is ***not*** the address for the building where the Tenant leased space (NYSCEF Doc. No. 12). The address for the building per the Lease is 28 West 20th Street. Accordingly, the branch of the Landlord's motion for summary judgment and a declaratory judgment that the Tenant breached the Lease is granted

(*see 200 Genesee St. Corp. v City of Utica*, 6 NY3d 761, 762 [2006] [remarking that trial court should have declared rights of parties rather than simply dismissing the complaint on a motion for summary judgment concerning a declaratory judgment]).

Additionally, the Tenant has failed to install necessary sound protection to meet its obligation under Section 4H of the Lease. As discussed above, the Lease required the Tenant to comply with all Legal Requirements including Sections 24-218, 24-231, and 24-232 of the Noise Code. Robert Lee, the Plaintiff's sound expert, conducted sound readings taken in the basement cellar below the Premises between December 2015 to May 2019 and produced reports which reveal that that the noise measured consistently exceed the permitted levels in the Noise Code (NYSCEF Doc. No. 95, Exhs. 3-15). In its opposition papers, the Tenant fails to raise a material issue of fact. Ken Shook, Tenant's expert, also took sound readings in the basement cellar below the Premises. His report reveals that sound readings taken in March 2017 and May 2019 were also above the permitted level and indicates that additional sound proofing would be needed to reduce sound levels, and/or that the landlord would need to drop the ceiling in the basement space and provide other sound attenuation limits (NYSCEF Doc. No. 95, Exhs. 16, 17). This is not required by the Lease. Accordingly, the branch of the Landlord's motion for summary judgment and a declaratory judgment that the Tenant breached the Lease for failure to soundproof the Premises is granted.

In light of the foregoing, the Yellowstone Injunction must be vacated (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514-515 [1999] [a Yellowstone injunction only stays the landlord's termination of a leasehold while the underlying

default is litigated]) and the Tenant's first cause of action for a permanent injunction and its second cause of action for a positive injunction must be dismissed.

B. Breach of the Covenant of Quiet Enjoyment (Fifth Cause of Action)

In its Amended Complaint, the Tenant alleges that the Landlord breached of the covenant of quiet enjoyment by attempting to terminate the Lease in bad faith (NYSCEF Doc. No. 32, ¶¶ 156-164). However, the Tenant fails to plead that it abandoned the Premises, which is a required element of such a claim (*127 Rest. Corp. v Rose Realty Group, LLC*, 19 AD3d 172, 173 [1st Dept 2005] [dismissing breach of covenant of quiet enjoyment clam since record indicated that plaintiff remained in full possession of leased premises], citing *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970] [tenant must abandon possession of premises to claim that there was a constructive eviction]). In any event, there is no basis to find that the Tenant abandoned the Premises as Mr. Glazer testified that the Tenant continued to operate since its opening in May 2015 (NYSCEF Doc. No. 92, Exh. G at 49:2-6). Accordingly, the branch of the Landlord's motion to dismiss the fifth cause of action for breach of the covenant of quiet enjoyment is granted.

C. Breach of the Covenant of Good Faith and Fair Dealing (Sixth Cause of Action)

In sum and substance, the Tenant alleges that the Landlord violated "its good faith obligations under the Lease" when the Landlord frustrated the Tenant's use and enjoyment of the Premises, causing loss of commercial use and depriving the Tenant of its benefits under the Lease (NYSCEF Doc. No. 32, ¶¶ 165-179). However, a breach of the implied duty that arises from a contract must be dismissed as duplicative (*Engelhard Corp. v Research Corp.*, 268 AD2d 358,

358-359 [1st Dept 2000]; *see also Triton Partners LLC v Prudential Sec.*, 301 AD2d 411, 411 [1st Dept 2003] [dismissing breach of good faith and fair dealing claim as it was substitute for nonviable breach of contract claim]). Accordingly, the branch of the Landlord's motion to dismiss the sixth cause of action for breach of the covenant of good faith and fair dealing is granted.

Accordingly, the Landlord's motion for summary judgment is granted and the Tenant's cross-motion for summary judgment is denied.

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is granted; and it is further

ORDERED that the plaintiff's cross-motion for summary judgment is denied; and it is further

ADJUDGED and DECLARED that the plaintiff is in default of paragraphs 4, 5, 6, 9, and 47 of the Lease; and it is further

ORDERED that the Yellowstone Injunction granted on the record following oral argument on July 6, 2016 (*see* Mtn. Seq. 001; 7/6/2016 Tr., NYSCEF Doc. No. 48) is hereby vacated; and it is further

ORDERED that that portion of the defendant's motion that seeks the recovery of costs and attorneys' fees is granted and shall be held in abeyance pending the lifting of the bankruptcy stay, at which point the defendant may make an application to have the matter of costs and attorneys' fees severed and referred to a Special Referee to hear and determine.

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3/23/2021
DATE

ANDREW BORROK, J.S.C.

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