Radiance Health & Aesthetics LLC v Victor Regenerative Medicine Ctrs. LLC
2021 NY Slip Op 31622(U)
May 14, 2021
Supreme Court, New York County
Docket Number: 160279/2020
Judge: David Benjamin Cohen

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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RADIANCE HEALTH & AESTHETICS LLC,

Plaintiff,

- v -

VICTOR REGENERATIVE MEDICINE CENTERS LLC,

Defendant.

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INDEX NO. 160279/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISS.

In this action by plaintiff Radiance Health & Aesthetics LLC seeking damages for, inter alia, breach of contract, defendant Victor Regenerative Medicine Centers LLC moves, pursuant to CPLR 3211(a)(7), to dismiss the second, third, fourth and fifth causes of action in the complaint.[1] Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3211(c) and 3212, for summary judgment against defendant. Defendant opposes the cross motion. After consideration of the parties' arguments, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2018, plaintiff leased 635 Madison Avenue, Suite 1400 in Manhattan ("the premises") from nonparty Ironwood Realty Corporation ("the owner"). Doc. 1 at par. 9; Doc. 3 at section 1.01. Plaintiff was to use the premises as a chiropractic office. Doc. 3 at section 1.01.

[1] Defendant seeks partial dismissal of the third cause of action.

Although section 11.01 of the lease provided that plaintiff was "not [to] assign, mortgage or encumber [the] [l]ease" or to sublet the premises without the owner's consent, it also stated that:

> Notwithstanding the foregoing, [plaintiff] shall have the right, without [owner's] consent but on written notice to [owner], to grant to fully licensed and insured physicians unaffiliated with the [plaintiff's] practice the license to use certain portions of the [d]emised [p]remises, provided however that at all times (i) [plaintiff] shall remain the primary occupant of the [l]eased [p]remises, and (II) [plaintiff] shall not charge any such licensee any license fee or other amounts in excess of the pro-rated [m]inimum [a]nnual [r]ent attributable to the portion of the [d]emised [p]remises licensed to such license[e] for the periods covered by such license. Such [l]icensee's [sic] must agree in writing to be bound by the terms and conditions of the [l]ease, and [plaintiff] must provide [owner] with a copy of such written agreement prior to any such licensee being given access to the [p]remises.

On or about June 1, 2020, plaintiff entered into a three-year license agreement with defendant, a medical practice owned by Steven Victor, M.D. ("Dr. Victor"). Doc. 1 at pars. 5, 6 and 12; Doc. 2. The license agreement allowed defendant the use of "one [c]onsultation [r]oom (off waiting room), two treatment rooms, and one room used as a stem cell lab" ("the licensed area") at the premises. Doc. 1 at par. 11; Doc. 2. The license agreement further provided that:

1. defendant was to pay plaintiff a license fee of $15,000 "in advance on the first (1st) day of every month falling during the first [l]icense [y]ear" (Doc. 2 at par. 3.1);

2. defendant was to pay plaintiff $30,000 (two months' in license fees) as a security deposit, which plaintiff was permitted to apply "to the extent required for the payment of any such amounts as to which [defendant] is in default . . ." (Doc. 2 at par. 3.2);

3. defendant was not permitted to "make any alterations, renovations, improvements, betterments, or other modifications to the [licensed area] without the prior consent of [plaintiff]" (Doc. 2 at par. 4.2);

4. in the event of a breach of the license agreement by defendant, including any breach of the terms of the lease by defendant, plaintiff was required to provide defendant notice thereof, and defendant was to be allowed time to cure such default, which period was to "be equal to the lesser of: (i) the period prescribed by the [l]ease for the cure of such breach or default, or (ii) (x) in the event of a monetary default, five (5) business days, or (y) in the event of a non-monetary breach or default, fifteen (15) days. Should [defendant] fail to cure such breach or default prior to the expiration of the aforesaid period, [plaintiff] may terminate [the license agreement] by written notice to [defendant] . . ." (Doc. 2 at par. 6.2);

5. Upon termination of the license agreement, defendant was to "immediately vacate the [p]remises . . ." (Doc. 2 at par. 6.3);

6. Defendant was to obtain liability insurance in an amount "reasonably requested by [plaintiff], including but not limited to coverage required under the [l]ease", and that defendant was to provide defendant with a certificate of insurance naming plaintiff and the owner as additional insureds (Doc. 2 at par. 5.2.1);

7. If defendant failed to cure a breach of the license agreement within the time required, plaintiff was permitted to terminate the license agreement by written notice to defendant, and the termination was to become effective three (3) business days after the delivery of the notice to cure unless the breach(es) was cured before the expiration of the three-day period (Doc. 2 at par. 6.2).

8. Paragraph 2.1.1 provided that if the licensee held over in possession after the termination of the license agreement, such holdover was not be deemed an extension of the term of the license but rather was to continue based on the covenants, conditions, and representations set forth in the license agreement, with the exception that defendant was obligated to pay plaintiff $500 for each calendar day or fraction thereof that it remained in possession of the premises or any portion thereof (Doc. 2 at par. 2.1.1);

9. Paragraph 2.3.2 provided that any rights obtained by defendant pursuant to the license agreement were to be equal to the rights of any other licensee at the premises (Doc. 2 at par. 2.3.2); and

10. Paragraph 1.2 of the license agreement provided that it "shall at all times be subordinate to the [l]ease" and that defendant received a copy of the lease and "acknowledge[d] that a breach of the [l]ease shall be deemed a breach [of the license agreement]" (Doc. 2 at par. 1.2).[2]

On October 8, 2020, plaintiff served defendant with a notice to cure claiming that it violated paragraph 3.1 of the license agreement by failing to pay license fees for July through October 2020, a total of $60,000, that plaintiff applied the $30,000 security deposit to the amount defendant owed, and that, if the outstanding license fees were not paid within 5 days, plaintiff could terminate the license agreement. Doc. 4. The notice to cure also advised defendant that it had violated paragraph 4.2 of the license agreement by installing a video camera, without

[2] The license agreement provided, however, that it did not create a landlord-tenant relationship. Doc. 2 at par. 83.

plaintiff's permission, at the reception desk facing the entrance door and waiting area used by defendant and warned that, if the camera was not removed within 15 days, plaintiff could terminate the license agreement. Doc. 4. Additionally, the notice to cure advised defendant that it failed to provide plaintiff with a certificate of liability insurance naming plaintiff and the owner as additional insureds and that, if such certificate of insurance was not provided within 15 days, plaintiff could terminate the license agreement. Doc. 4.

By October 26, 2020, the deadline set forth in the notice to cure, defendant still had not cured its breaches of the license agreement and, the following day, plaintiff served defendant with a notice of termination advising it that the license was to be terminated as of October 31, 2020. Doc. 1 at par. 22; Doc. 5. The notice of termination also advised defendant that, if it did not vacate the premises by October 31, 2020, plaintiff would commence an action against it seeking to remove it from the licensed area. Doc. 1 at par. 23.

As of November 27, 2020, defendant still had not vacated the premises and plaintiff commenced the captioned action alleging, inter alia, that defendant breached the license agreement and, as of November 25, 2020, owed plaintiff $30,000 in license fees plus $12,500 in penalties pursuant to paragraph 2.1.1 of the license agreement, a total of $42,500, and that the arrears continued to accrue pendente lite. Doc. 1 at par. 1; Doc. 2 at par. 2.1.1.

Plaintiff further claimed that defendant attempted to intimidate it, harassed other licensees, and placed plaintiff and other licensees occupying the premises at risk of exposure to COVID-19. Doc. 1 at par. 37. Specifically, plaintiff claimed that, on November 15, 2020, defendant notified it that two of defendant's employees tested positive for COVID-19, that plaintiff immediately notified all licensees that the premises would be closed on November 16, 2020 for professional deep cleaning of the premises, including the licensed area, and requested

that all employees be tested for COVID-19 and return to the office only if they tested negative for the virus. Doc. 1 at par. 40. In an email to plaintiff dated November 16, 2020, Dr. Victor represented that he had cleaned and locked the licensed area and that, if the cleaners hired by plaintiff entered the said area, he would call the police. Doc. 1 at par. 41; Doc. 7. Despite his direct exposure to his infected employees, Dr. Victor allegedly ignored plaintiff's request that he be tested for COVID-19 and he came to the premises on November 16, 2020 while the cleaners were there. Doc. 1 at par. 42. On November 17 and 18, 2020, Dr. Victor allegedly entered the premises again without being tested. Doc. 1 at par. 43.

As a first cause of action, plaintiff alleged defendant's violation of the license agreement rendered the latter liable for damages in breach of contract, plus interest. Doc. 1 at pars. 49-53. As a second cause of action, plaintiff alleged that defendant was liable in damages on a quantum meruit theory, plus interest. Doc. 1 at pars. 55-60. As a third cause of action, plaintiff alleged that: it was entitled to a judgment declaring that defendant was liable for the license fees it owed, plus interest; defendant was required to remove the cameras it installed at the premises; defendant was obligated to obtain liability insurance; and defendant was obligated to stop harassing the other licensees. Doc. 1 at pars. 62-70. As a fourth cause of action, plaintiff alleged ejectment. Doc. 1 at pars. 72-76. As a fifth cause of action, plaintiff claimed that, if it prevailed in this action, it was entitled to attorneys' fees, costs and disbursements from defendant pursuant to paragraph 1.2 of the license agreement and paragraph 21.04 of the lease. Doc. 1 at pars. 78-80; Docs. 2 and 3.

Defendant now moves, pursuant to CPLR 3211(a)(7), to dismiss the second, third (in part), fourth and fifth causes of action. Doc. 11. In support of the motion, defendant submits an attorney affirmation, a memorandum of law, the complaint (with the affidavit of service thereof),

and a stipulation extending its time to answer or move. Docs. 12-17. Defendant argues that the second cause of action, for quantum meruit, must be dismissed since the license agreement defines the obligations between the parties. Doc. 17 at 4. Defendant further asserts that the portion of the third cause of action seeking license fees must be dismissed since it is duplicative of the breach of contract claim. Doc. 17 at 4-6. Next, defendant maintains that the fourth cause of action, sounding in ejectment, must be dismissed since it is inadequately pleaded. Doc. 17 at 7. Finally, defendant argues that the fifth cause of action, seeking attorneys' fees, must be dismissed since it is not a separate cause of action. Doc. 17 at 8.

Plaintiff opposes the motion, asserting that it has validly stated claims for quantum meruit recovery, declaratory relief, ejectment, and attorneys' fees. Doc. 33. It also cross-moves, pursuant to CPLR 3211(c), for an order deeming the defendant's motion to dismiss as one for summary judgment pursuant to CPLR 3212, as well as for an order granting it summary judgment as follows:

a. on the first cause of action in the amount of $78,500.00, as of January 26, 2021, plus unpaid license fees at a rate of $500.00 per day as they continue to accrue, with interest, until the date of judgment;

b. on the third cause of action issuing a declaration that defendant is, and continues to be, liable to plaintiff for license fees for the continued use of the licensed area pendente lite and that defendant must pay the license fees for the continued use of the licensed area pendente lite along with a declaration that defendant must: remove the unauthorized cameras/alterations; provide plaintiff with a certificate of liability insurance naming plaintiff and the owner as additional insureds; cooperate with plaintiff's reasonable efforts to keep the premises safe; remove recording equipment being used to monitor other licensees and their patients and to stop sending harassing emails to other licensees;

c. on the fourth cause of action, issuing an order ejecting defendant, its agents, servants, and all persons claiming under it from the licensed area and immediately restoring plaintiff to possession of the licensed area and awarding plaintiff damages;

d. On the fifth cause of action, for attorneys' fees, costs, disbursements and expenses, in an amount to be determined by the Court but in no event less than $20,000; and

e. For such other and further relief as the Court deems just and proper.

Doc. 20.

In support of its cross motion, plaintiff submits, inter alia, an attorney affirmation; the affidavit of Arkady Lipnitsky, a principal of plaintiff; the pleadings; the lease; the license agreement; the notice to cure and notice of termination; and the license fee ledger. Docs. 21-32.

In reply, defendant argues that this Court should not treat its motion as one for summary judgment and reiterates its previous arguments regarding dismissal of the claims discussed in its initial papers. Doc. 38.

LEGAL CONCLUSIONS

Defendant's Motion To Dismiss

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7):

> "the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618, 621-622 [1st Dept 2018]). Further, a motion court must only determine "whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 67 [1st Dept 2015]).

(*Feldman v Port Auth. of NY & New Jersey*, ___AD3d___, 2021 NY Slip Op 01719, *2 [2021]).

Plaintiff's quantum meruit claim (second cause of action) must be dismissed since the license agreement governed the relationship between the parties (*see Lakhi Gen. Contr., Inc. v New York City Hous. Auth.*, 189 AD3d 480 [1st Dept 2020]).

The branch of the declaratory judgment claim (third cause of action) seeking to recover license fees from defendant is dismissed as duplicative of plaintiff's breach of contract claim.

Since breach of contract claims require proof that an agreement was breached, a separate claim seeking a declaratory judgment related to the breach is superfluous (*see DPB Family LLC v Eutychia Group LLC*, 2018 NY Misc LEXIS 4744, 2018 NY Slip Op 32655[U] [Sup Ct New York County 2018] citing *Cherry Hill Market Corp. v Cozen O'Connor P.C.*, 118 AD3d 514, 515 [1st Dept 2014]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

As defendant argues, the claim for ejectment (fourth cause of action), must be dismissed since the complaint does not adequately describe the premises from which plaintiff seeks to remove defendant (*see* Real Property Actions and Proceedings Law ("RPAPL") §641; *Greenwood Lake Shore Land Co. v Moses*, 251 AD 860 [2d Dept 1937]). Plaintiff description of "[t]he area from which removal of [d]efendant is sought" is quite vague: "one [c]onsultation [r]oom (off waiting room), two treatment rooms, and one room used as a stem cell lab" at the premises.[3] Doc. 1 at par. 11. Even assuming, arguendo, that the description of the licensed area was sufficient, the moratorium on evictions currently in place in New York State (S.6362-A/A.7175-A) prohibits a commercial tenant from being evicted until August 31, 2021.

Finally, the claim for attorneys' fees (fifth cause of action) is dismissed since "it is axiomatic that New York does not recognize a request for attorneys' fees as an independent, separately-styled cause of action" (*Fishman v Kids In Common, Inc.*, 2021 NY Slip Op 30991[U] [Sup Ct New York County 2021]; *Faver v 12 E. 97th St. Owners, Inc.*, 2014 Slip Op 33357[U] [Sup Ct New York County 2014]).[4]

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[3] Although Lipnitsky represents that the floor plan attached to his affidavit shows the licensed area, this Court has been unable to find any authority for the proposition that a demonstrative exhibit such as that submitted may be used to remedy a party's failure to comply with RPAPL §641.

[4] Plaintiff may, however, recover any attorneys' fees to which it proves it is entitled pursuant to a statute, the license agreement, and/or the lease.

Plaintiff's Cross Motion For Summary Judgment

CPLR 3211(c) provides, in relevant part, that:

> Upon the hearing of a motion made under subdivision (a) or (b) [of CPLR 3211], either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.
>
> "There are, however, three exceptions to the requirement of notice. If the action involves no issues of fact, but only issues of law fully appreciated and argued by both sides, it is proper for the court to grant summary judgment to either side without first giving notice of its intention to do so. Such is often times the case in declaratory judgment actions involving an issue of statutory construction" (*Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320-21 [1st Dept 1987] [internal citations omitted]). "The second exception is when a request for CPLR 3211(c) treatment is specifically made by both sides; the third when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course" (*Id.* at 320-21 [internal citations omitted]).

(135 E. 57th St., LLC v Saks Inc., 2021 NY Slip Op 30270[U], *6 [Sup Ct, NY County 2021]).

Here, this Court did not give the parties any notice, much less adequate notice, that the defendant's motion to dismiss would be treated as one for summary judgment, and the fact that plaintiff requested such relief does not vitiate the notice requirement *(Valentine Tr., Inc. v Kernizan*, 191 AD2d 159, 160 [1st Dept 1993]).

Additionally, none of the three exceptions to the notice rule set forth above apply herein. First, this action does not involve solely questions fully appreciated and argued by both sides. As defendant argues, plaintiff's own papers reflect that there are issues of fact to be determined in this matter, including the issue of whether defendant breached paragraph 4.2 of the license agreement by installing surveillance cameras in the licensed area. Doc. 35 at par. 5. Other potential issues of fact also exist including, but not limited to, whether defendant obtained adequate insurance for the licensed area and whether defendant harassed other licensees at the

premises. The second exception does not exist since both parties did not specifically request that defendant's motion be treated as one for summary judgment; in fact defendant urges that its motion should *not* be treated as such. Nor have both parties made it unequivocally clear that they charted a summary judgment course, as indicated by defendant's vehement opposition the application of CPLR 3211(c) herein.

Finally, plaintiff's cross motion is denied. CPLR 3212(a) permits a party to move for summary judgment only after issue has been joined. Since defendant has yet to answer, this Court is constrained to deny the cross motion as premature (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985] [citations omitted]).

The parties' remaining arguments are either without merit or need not be addressed given the findings above.

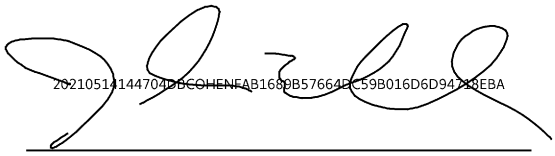
Accordingly, it is hereby:

ORDERED that defendant's motion to dismiss is granted and the second cause of action, the portion of the third action seeking to recover license fees from defendant, the fourth cause of action, and the fifth cause of action of the complaint are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that plaintiff's cross motion is denied without prejudice; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on June 21, 2021 at 3 p.m. via Microsoft TEAMS (invitation to be emailed by the Part 58 Clerk) unless they first complete a bar coded preliminary conference form (to be emailed by the Part 58 Clerk) and return it to Part 58 at SFC-Part58-Clerk@nycourts.gov least two business days prior to the scheduled appearance.



5/14/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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