

Gotham Real Estate Devs., LLC v 432 Park S. Realty Co LLC
2021 NY Slip Op 32193(U)
October 29, 2021
Supreme Court, New York County
Docket Number: Index No. 653493/2021
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR ENGORON

PART

37

Justice

-----X

GOTHAM REAL ESTATE DEVELOPERS, LLC,

Plaintiff,

- v -

432 PARK SOUTH REALTY CO LLC, A. RODRIGUEZ
CONSTRUCTION LLC,

Defendants.

-----X

INDEX NO.	653493/2021
MOTION DATE	08/24/2021
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 41, 42, 43, 44, 45

were read on this motion to

DISMISS

Upon the foregoing documents, and for the reasons stated hereinbelow, defendant's motion to dismiss is granted in part and denied in part.

Background

Plaintiff, Gotham Real Estate Developers LLC ("Tenant"), leases the entire second floor of 432 Park Avenue South, New York, New York ("the Premises"), from defendant, 432 Park South Realty Co LLC ("Landlord"). The lease commenced July 1, 2015, and expires December 31, 2026. NYSCEF Doc. No. 6.

In or around the spring of 2016, Tenant claims the Premises' HVAC stopped working and "Landlord failed and refused to undertake the necessary repairs or replacements," causing Tenant to replace the unit so as to "mitigate its damages and to continue its normal business operations." NYSCEF Doc. No. 1.

On March 18, 2018, Landlord received a summons from the New York City Department of Buildings ("the DOB") for its "failure to submit acceptable 8th round report of critical examination documenting condition of exterior walls and appurtenances required by 28-302.4." NYSCEF Doc. No. 11. On October 26, 2018, pursuant to NYC Admin. Code § 28-302.4, Landlord filed the required compliance document with the DOB ("Compliance Filing"), showing the building's façade to be "unsafe." NYSCEF Doc. No. 12. Soon after, Landlord hired defendant A. Rodriguez Construction LLC ("Contractor"), and, in December 2018, pursuant to NYC Admin. Code § 28-302.5, Contractor began work to fix the building's century-old terra cotta façade, a project which, photographed documentation shows, entailed extensive scaffolding and netting around the entire building. NYSCEF Doc. No. 13.

On November 4, 2020, Landlord commenced a nonpayment action against Tenant (“the Prior Action”). Tenant answered with denials, and a number of counterclaims and affirmative defenses, all of which Landlord moved to dismiss. Thereafter, Justice Bluth dismissed all of Tenant’s counterclaims and affirmative defenses, noting that counterclaims were contracted out of the lease. 432 Park S. Realty Co LLC v Gotham Real Estate Dev. LLC, Index No. 159434/2020 (Feb. 26, 2021, Sup Ct, NY County). Later, Justice Bluth granted a summary judgement motion against Tenant as to liability only. 432 Park S. Realty Co LLC v Gotham Real Estate Deve. LLC, Index No. 159434/2020 (Jun. 21, 2021, Sup Ct, NY County).

On May 27, 2021, Tenant commenced the instant action against Landlord and Contractor asserting nine causes of action: (1) breach of lease against Landlord for failure to make building and HVAC repairs; (2) partial constructive eviction against Landlord; (3) nuisance against both defendants; (4) trespass against both defendants; (5) conversion against both defendants; (5) breach of contractual duty to safeguard premises against both defendants; (7) negligence against both defendants; (8) breach of covenant of quiet enjoyment against Landlord; and (9) declaratory relief against Landlord permitting it to terminate its lease, or, in the alternative, granting it rent abatement and damages.

On July 1, 2021, Landlord moved, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss Tenant’s complaint.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Leon v Martinez, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR(a)(5) is warranted when “the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.” And dismissal pursuant to CPLR 3211(a)(7) is warranted when, “afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference,” the complaint fails to assert to the court facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

1. Breach of Lease for Failure to Make Building and HVAC Repairs

The first cause of action asserts that Landlord breached the lease: a) when it failed to maintain the building such that it required the ongoing façade work and b) when it failed to repair or replace the HVAC unit in the Premises.

Tenant’s claim that that Landlord breached the lease by not making sufficient ongoing repairs to a more than century-old terra cotta façade covering 16 floors fails. The Compliance Filing is clear that the building was deemed safe in its previous inspection cycle and that soon after unsafe conditions were reported, Landlord retained Contractor to fix them.

Paragraph 44.12, titled “Air Conditioning Contract,” provides that Tenant shall “obtain and maintain at Tenant’s sole cost and expense an air-conditioning maintenance contract” for the Premises’ HVAC and that, in the event of repair or replacement of the unit, “provided Tenant has

maintained said service contract in full-force and effect throughout the term of this Lease, then Landlord shall be responsible for said repair or replacement to the extent not covered by the service contract.”

Tenant claims that “Landlord failed and refused to undertake the necessary repairs or replacement” of the Premises’ HVAC, pursuant to Paragraph 44.12 of the lease, and as a result the Premises were “at imminent risk of becoming unusable and unfit for safe and productive occupancy, due to impending hot weather,” requiring Tenant to replace the unit at its own expense. Tenant further claims it performed all its obligations under Paragraph 44.12, that it brought to the attention of Landlord its alleged actions and inactions “numerous times by email, telephone, as well as in a formal default notice sent by Plaintiff in September 2020,” and that “despite due demand,” Landlord has not offered any reimbursement.

Landlord claims it never received written notice of any alleged default, and therefore could not have breached the lease, as Paragraph 46.02 of that instrument provides, “Landlord shall not be in default under this Lease in any respect unless the Tenant shall have given the Landlord written notice of the breach ... and within thirty (30) days after notice, the Landlord has not cured ... or ... commenced diligently to prosecute the cure to completion.”

Affording Tenant every possible favorable inference, there is a cognizable claim of breach regarding the HVAC repair and replacement.

Consequently, Tenant’s first cause of action is subject to dismissal as to building repairs but not as to the repair and replacement of the Premises’ HVAC.

2. Partial Constructive Eviction

The second cause of action asserts that, due to the scaffolding around the Premises and the “outrageous conduct of Landlord, Contractor or their agents,” Tenant and its employees were “forced ... to quit and abandon material portions of the Premises and to significantly restrict access by its employees to other areas which overlook the sidewalk shed” to the extent that plaintiff was partially constructively evicted.

“To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises.” Barash v Pennsylvania Term. Real Est. Corp., 26 NY2d 77, 78 (1970). Also, “[o]rdinarily, a principal is not liable for the acts of independent contractors in that, unlike the master-servant relationship, principals cannot control the manner in which the independent contractors’ work is performed.” Chainani by Chainani v Bd. Of Educ. of City of N.Y., 87 NY2d 370, 380-1 (1995).

Tenant argues that the actions of Contractor’s *workers* were wrongful and as such, citing Minjak Co. v Randolph, 140 AD2d 245 (1st Dep’t 1988), defendants are liable for their behavior. However, the instant case is distinguished from Minjak in that there the offending worker actions (demolishing stairs without leaving a warning sign, jackhammering a new entrance directly into a loft, installing a new door without a sill such that brick fragments and concrete fell onto a tenant) were performed as agents to, and in pursuance of the interests of, the landlord. Here, as Landlord’s action (putting up scaffolding around its building to rehabilitate its façade) was required by law and done for public safety, and the alleged offending actions of Contractor’s

workers (bottling urine, standing around idly, sleeping) are outside the scope of employment and not in the pursuance of the interests of either Contractor or Landlord, Tenant's second cause of action is subject to dismissal.

3. Nuisance

The third cause of action asserts that defendants' "intentional, outlandish, disruptive, embarrassing and destructive conduct" including "sometimes shouting, using profanity" and "urinating into improvised receptacles," has "materially interfere[d] with Plaintiff's use of the Premises, its business operations and materially impacts Plaintiff's ability to earn profits it would otherwise realize."

The elements of a private nuisance claim are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." Copart Indus. v Cons. Edison Co. of N.Y., 41 NY2d 564 (1977).

"Nuisance imports a continuous invasion of rights – 'a pattern of continuity or recurrence of objectionable conduct.'" Domen Holding Co. v Aranovich, 1 NY3d 117, 124 (2003) (internal quotation marks and citations omitted).

Landlord argues that Paragraph 4.1 of the lease, providing in part that "[o]wner shall make all repairs and improvements necessary to keep in reasonably good repair and condition the building (including all exterior walls, the building shell...," implies that Tenant agreed to the building's exterior repairs and therefore "is barred from complaining." Landlord also asserts that it cannot be liable for alleged acts of its independent contractors.

Plaintiff, however, emphasizes that here the nuisance arises not from the legally mandated sidewalk shed but from the "lewd, graphic and offensive conduct" of Contractor's agents, which Tenant says it "repeatedly notified [Landlord] about and demanded an end to" and which Landlord has failed to stop.

Affording Tenant every possible favorable inference, however, there is still not a cognizable claim for private nuisance against defendants. Allegations of workers sometimes shouting, using profanity, regularly sleeping, and even relieving themselves into containers in full view does not rise to the level of a pattern of continuity or recurrence of objectionable conduct to sustain a private nuisance claim. And in any event, Landlord cannot be held liable for the acts of its independent contractors, and there is nothing in the record to show that Contractor was notified of Tenant's complaints.

Therefore, Tenant's third cause of action is subject to dismissal.

4. Trespass

The fourth cause of action asserts: (a) that a "certain individual employed by or with express or implicit permission" of defendants trespassed upon the Premises on or about the morning of June 14, 2019, and (b) defendants alleged partial constructive eviction constituted trespass.

Tenant fails on both arguments as: (a) because there was no partial constructive eviction, supra, there was no trespass; and (b) any vicarious liability claims arising from the June 14, 2019, incident fails under the doctrine of *respondeat superior*, as the claimed acts were not part of any construction worker's job and would not have served either Landlord or Contractor's interests. See White v Hampton Mgmt. Co. L.L.C., 35 AD3d 243, 244 (1st Dep't 2006).

Therefore, Tenant's fourth cause of action is subject to dismissal.

5. Conversion

The fifth cause of action asserts that Landlord, Contractor, or persons under their supervision and control, tortiously converted Tenant's personal property.

Paragraph 47.03 of the lease, titled "Damages or Loss," states, "neither Landlord nor any agents or employees of Landlord shall be liable to Tenant or any other occupant of the Demised Premises, for any damage to, or loss (by theft or otherwise) of, any property of Tenant."

Tenant argues that Paragraph 47.03 is irrelevant when faced with the doctrine of *respondeat superior* and that "it was reasonable for Landlord to anticipate that unruly and unprofessional workers stationed just outside the Premises' windows might enter the Premises and convert Tenant's property.

But the foreseeability described by Tenant is likely exactly *why* Landlord contracted out of any liability for theft on behalf of itself, its agents and its employees in Paragraph 47.03.

Therefore, Tenant's fifth cause of action is subject to dismissal.

6. Breach of Contractual Duty to Safeguard the Premises

The sixth cause of action asserts that defendants breached their contractual duty to safeguard the Premises.

Specifically, Tenant argues: (a) that it is a third-party beneficiary of Landlord's contract with Contractor; (b) that persons who were employed by defendants were permitted expressly or "by [defendants] willful refusal to take required security measures" converted plaintiff's property; and (c) that "Landlord failed to keep the windows in good repair and secured," in violation of Paragraph 4 of the lease, in which the Landlord promises to maintain and repair the exterior of the building, including the windows.

Landlord responds by citing Paragraph 44.13 of the lease, titled "Security System," which provides that "Tenant may install, maintain and repair its own security system and security devices at the Demised Premises inasmuch as Tenant is solely responsible for the installation of the security system and security devices at the Demised Premises."

Here, Tenant is merely an incidental beneficiary of any agreement between Contractor and Landlord and absent express contractual language has no breach claim against Contractor. See Dormitory Auth. v Samson Constr. Co., 30 NY3d 704, 710 (2018). Further, even affording Tenant every possible favorable inference, there is nothing in the complaint to show the claimed conversion is the consequence of Landlord's actions.

Therefore, as Tenant is only an incidental third-party beneficiary and was solely responsible for installing a security system on the Premises, Tenant's sixth cause of action is subject to dismissal.

7. Negligence

Tenant claims in its seventh cause of action that both defendants were negligent in their duties to: (a) protect the Premises during the repair work; (b) complete the work in a timely manner; and (c) safeguard the Premises.

Affording Tenant every possible favorable inference, however, Tenant fails to show defendants had the duties it claims were negligently breached and so Tenant's seventh cause of action is subject to dismissal. See supra.

8. Covenant of Quiet Enjoyment

Tenant claims in its eighth cause of action that "improper, unreasonable, negligent and intentional actions of Landlord and Contractor ... have and continue to violate Plaintiff's right to the quiet enjoyment of the Premises."

Landlord notes that the Prior Action has already determined that Tenant has not paid rent since April 2020 and points to Paragraph 23 of the lease, titled "Quiet Enjoyment," which provides: "Owner covenants and agrees with Tenant that upon Tenant paying the rent and additional rent and observing and performing all the terms, covenants and condition, on Tenant's part to be observed and performed, Tenant may peaceably and quietly enjoy the premises hereby demised."

Expressio unius est exclusio alterius. Here, Landlord's agreement entitling Tenant to quiet enjoyment if they pay their rent implies that they are not entitled to quiet enjoyment if they fail to pay their rent. And so, as Tenant has not fulfilled its obligations as described in Paragraph 23 of the lease, Tenant has not met a condition of the covenant quiet enjoyment.

Therefore, Tenant's eighth cause of action is subject to dismissal.

9. Declaratory Relief

Finally, in its ninth cause of action, Tenant claims as it has no remedy at law, it is entitled to a declaration permitting it to terminate its lease, or, at the least, to rent abatement and damages.

Withholding of rent while in possession of demised premises is "a violation of a fundamental covenant of the lease, regardless of any breach by the [landlord]." Allerand, LLC v 233 East 18th Street Co., L.L.C., 19 AD3d 275, 277 (1st Dep't 2005), citing Earbert Rest., Inc., v Little Luxuries, Inc., 99 AD2ede 734, 472 (1984).

As there is no justiciable controversy in this action requiring a declaration from this Court, and as there is nothing in the lease, which Tenant has violated, to permit its termination, Tenant's ninth cause of action is subject to dismissal.

Conclusion

Defendant 432 Park South Realty Co., LLC's motion to dismiss the claims of plaintiff Gotham Real Estate Developers LLC is denied as to the first cause of action and granted as to the second,

third, fourth, fifth, sixth, seventh, eighth, and ninth causes of actions. The Clerk is hereby directed to enter the judgement accordingly.



10/29/2021
DATE

ARTHUR ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE