

Good Co. Pictures, LLC v 132 Cloud Nine, LLC

2022 NY Slip Op 30169(U)

January 19, 2022

Supreme Court, New York County

Docket Number: Index No. 159260/18

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

GOOD COMPANY PICTURES, LLC et al.

INDEX NO. 159260/18

- v -

MOT. DATE

132 CLOUD NINE, LLC et al.

MOT. SEQ. NO. 001

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).
Replying Affidavits ECFS DOC No(s).

This action arises from a commercial lease of a residential condominium unit. Now, defendants 132 Cloud Nine, LLC ("Cloud 9"), Claire Anne Oliver and Ian Martin Rubinstein move for partial summary judgment against the plaintiffs Good Company Pictures, LLC ("tenant"), Jonathan Lia and Ryan Heiferman, on their first and third counterclaims, and a hearing or a determination on papers as to the amount of reasonable attorneys' fees to be awarded to defendants (CPLR § 3212). Plaintiffs cross-move for or an order pursuant to CPLR § 3211 (a)(1) and (7), and 3211(b) dismissing the defendants' affirmative defenses and counterclaims. Issue has been joined as to the counterclaims. Therefore, summary judgment relief is available. The court's decision follows.

The relevant facts are as follows. Pursuant to a written lease agreement dated September 8, 2015 (the "lease"), defendants Oliver and Rubinstein leased Unit 9 in the Stanwick Condominium (the "unit") to the tenant. The lease had a five-year and two-week term, ending on October 1, 2020 and the monthly rent was \$21,632.00 from October 1, 2017 through September 2018, and \$22,714.00 beginning on October 1, 2018. The lease further provides as follows:

You shall use the Apartment for living purposes and for Good Company Pictures LLC office, administrative and content editing during standard business hours. Maximum 10 associates may work in the space. The Apartment may be occupied only by You and the employees of Good Company Pictures LLC Permitted Occupants: You acknowledge that:

(ii) no other person other than You and the Permitted Occupants may reside in the Apartment without the prior written consent of the Owner and the Condominium.

Dated: 1/19/22

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [x] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

Good Company & J. Lia names will be on #9 buzzer and mailbox at front of building

Meanwhile, under the Condominium Declaration, paragraph 7 entitled Use of Units, (a) Residential Units:

Each Residential Unit shall be used as a residence and any lawful home occupation consistent with applicable zoning and building ordinances, resolutions and codes, and the certificate of occupancy for the Property, subject to the provisions of this Declaration and the By-Laws. Notwithstanding the foregoing, while the Declarant or its designee owns any Residential Unit, Declarant or its designee shall have the right to use any such Unit for general and sales office purposes, as models, to use such Units and the Common Elements for other purposes connected with the promotion, sales or leasing of Units, to erect and maintain signs at the Building in connection with the offering and sale by Declarant or its designee of Units therein, to have Declarant's employees, contractors, representatives and sales agents present on the site, to do all things necessary or appropriate including the use of the Common Elements to sell or lease Units, to complete the renovation of the Building and to comply with Declarant's obligation under the Offering Plan.

The Deed for the unit provides in relevant part as follows:

SUBJECT also to the terms, conditions, easements, covenants and provisions of the Declaration and of the By-Laws of the Condominium recorded simultaneously with and as part of the Declaration, as the same may be amended from time to time by instruments recorded in the Office of the City Register, New York County, which terms, conditions, easements, covenants and provisions, together with any amendments thereto, shall constitute covenants running with the land and shall bind any person having at any time any interest or estate in the Units, as if such provisions were recited and stipulated at length herein

...

The Unit shall be used as a residence (including permissible home occupations) as permitted by the Declaration, By-Laws and applicable law.

The Condominium By-Laws provide that "Residential Units, after obtaining a temporary or permanent certificate of occupancy for residential use, shall be used for dwelling purposes only ..." The Certificate of Occupancy ("CO") for the unit describes its use as "ONE (1) CLASS "A" APARTMENT".

Article 4 of the Lease provides:

This Lease shall be subject and subordinate to:

- (i) The Declaration of Condominium;
- (ii) The Rules and Regulations of the Condominium (which are sometimes called House Rules); and
- (iii) The By-Laws of the Condominium. (The Declaration, the Rules and Regulations and the By-Laws of the Condominium and all amendments thereto, including any amendments subsequent to the date hereof, are collectively called the "Condominium Documents".) In the event of any inconsistency between the provisions of this Lease and the Condominium Documents, the provisions of the Condominium Documents shall govern and be binding.

The Lease contains a written guaranty (the "guaranty") pursuant to which Lia and Heiferman (collectively, the "guarantors") "absolutely, unconditionally, and irrevocably" guaranteed the payment of "all rent and additional rent and other charges payable by Tenant under the Lease" up to the date that tenant surrendered possession of the unit to the landlord. During the term of the lease, by deed dated November 6, 2017, Oliver and Rubinstein transferred title to the unit from themselves, as husband and wife, to Cloud 9.

In June 2018, the tenant stopped paying rent and purported to surrender possession of the Unit in December 2018. Plaintiffs claim that they did so because the unit was not intended for business purposes and the Board of the Condominium were harassing plaintiffs and the tenants' employees. Plaintiffs allege during lease negotiations, the defendants withheld all of the governing documents for the Condominium and the unit "upon information and belief". Plaintiffs claim that defendants' representative informed them that the unit could be used "for either residential or commercial purposes or for both purposes." Plaintiffs further claim that they were informed that the unit had previously been used as an art studio and gallery. Plaintiffs allegations are substantiated by the sworn affidavit of Heiferman, a member of the tenant. Heiferman states: "At all times, Good Company used most, if not all of the available space in the Unit for its business, which throughout the duration of the Lease, consisted of ten (10) employees. Good Company would not have entered into the Lease, if it could not use the Unit as an office space."

Plaintiffs seek a declaratory judgment that: [1] the lease was terminated due to frustration of purpose and plaintiffs are entitled to restitution (first COA), [2] the lease is deemed rescinded and plaintiffs are entitled to restitution (third COA); [3] the guaranty is deemed terminated due to frustration of purpose of the lease or rescission (second and fourth COAs). Plaintiffs further assert causes of action for [1] breach of contract; [2] breach of duty of good faith and fair dealing; [3] fraud; [4] reimbursement of attorneys fees, costs and expenses; and [5] violation of GBL § 349.

In their answer, defendants assert various defenses, to wit, plaintiffs' claims are: [1] barred by voluntary payment; [2] duplicative; [3] barred by documentary evidence; [4] not pleaded with particularity and specificity; [5] barred by estoppel; [6] unjust enrichment, [7] equitable claims when plaintiffs have a remedy at law; [8] barred by the statute of limitations; [9] barred by doctrine of accord and satisfaction; [10] barred by plaintiffs' unclean hands; and [11] "barred by their agreement to look only to their landlord, and not to others, for relief on claims arising out of the parties' lease." Defendants further assert three counterclaims: [1] seeking unpaid rent due under the lease and guaranty; [2] ejectment; and [3] reimbursement of attorneys fees based upon the lease.

Parties' arguments

Defendants argue in support of their motion that they are entitled to partial summary judgment because there is no dispute that the tenant entered into the lease, stopped paying rent in July 2018 and surrendered possession in December 2018. Therefore, defendants seek summary judgment on the first and third counterclaims and a money judgment for unpaid rent from both tenant and the guarantors. Plaintiffs argue that the lease is not enforceable because it violated the Condominium Declaration and By-Laws, the Deed and plaintiffs' commercial use was inconsistent with the certificate of occupancy. Plaintiffs further dispute defendants' calculation of unpaid rent, specifically, the late fees. Plaintiffs otherwise maintain that they have raised triable issues of fact sufficient to defeat defendants' motion.

Plaintiffs seek dismissal of defendants' counterclaims, arguing that the lease should be rescinded due to frustration of purpose and documentary evidence shows the defendants "engaged in fraud." As for the affirmative defenses, plaintiffs argue they are "mere conclusions of law, and fail to provide Plaintiffs with any facts upon which they can defend against." Plaintiffs further argue that defendants' defenses lack merit.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Defendants have made a *prima facie* showing that the parties entered into the lease and guaranty, the tenants' breach by failing to pay rent due in June 2018, and the guarantors' breach by failing to honor the tenants' obligations. In turn, the court must consider whether plaintiffs have established a valid defense to enforcement of the lease and/or guaranty or at least raised a triable issue of fact sufficient to defeat the motion. The court agrees with plaintiffs.

To establish a defense of frustration of purpose, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Jack Kelly Partners LLC v. Zegelstein*, 140 AD3d 79 [1st Dept 2016] [internal quotations omitted] quoting *Crown IT Servs., Inc. v. Koval-Olsen*, 11 AD3d 263 [1st Dept 2004]). Impossibility of performance because use under a lease violated a certificate of occupancy can be raised as a defense to enforcement of a lease (*Jack Kelly Partners, supra* at 84).

Here, plaintiffs have come forward with sufficient proof to raise a triable issue of fact as to whether the lease should be rescinded (*Jack Kelly Partners, supra*). Accordingly, the motion is denied.

Turning to the cross-motion, plaintiffs have moved pursuant to CPLR § 3211 and documentary evidence does not unequivocally refute defendants' counterclaims. Even if plaintiffs had moved for summary judgment, triable issues of fact remain as to what transpired between the parties when they entered into the lease and whether the lease was sufficiently frustrated so as to warrant rescission. For example, the lease was not only for commercial use, but also permitted residential use and Lia's name was listed on the buzzer for the unit. Otherwise, the court rejects plaintiffs' arguments as to the defenses except for the eighth and eleventh defenses. Defendants have pleaded in conclusory fashion that plaintiffs' claims are barred by the statute of limitations and the defense that plaintiffs' claims are "barred by their agreement to look only to their landlord, and not to others, for relief on claims arising out of the parties' lease" fails to state a valid defense. Accordingly, the eighth and eleventh affirmative defenses are dismissed and the balance of the cross-motion is denied.

The parties' last stipulation required all outstanding paper discovery to be complete by August 4, 2021 and all depositions to be taken by August 31, 2021. Defendants filed their motion on August 4, 2021 and there is no indication that any depositions have yet been taken. Therefore, the court hereby directs the parties to complete all depositions on or before April 1, 2022. There will be no further extensions of this deadline absent good cause shown in a formal written application upon proper notice or the parties' stipulation to that effect. The court extends the deadline to file note of issue to April 29, 2022.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendants' motion for partial summary judgment is denied; and it is further


ORDERED that plaintiffs' cross-motion is granted only to the extent that the eighth and eleventh affirmative defenses are dismissed and the balance of the cross-motion is denied; and it is further

ORDERED that the parties shall complete all depositions on or before April 1, 2022. There will be no further extensions of this deadline absent good cause shown in a formal written application upon proper notice or the parties' stipulation to that effect; and it is further

ORDERED that the deadline to file note of issue is hereby extended to April 29, 2022.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 1/17/22
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.