

Landmark Ventures, Inc. v East Twenty Sixth Assoc.
2022 NY Slip Op 30787(U)
March 9, 2022
Supreme Court, New York County
Docket Number: Index No. 652240/2012
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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LANDMARK VENTURES, INC., LMV CAPITAL HOLDING
CORP.

INDEX NO. 652240/2012

Plaintiffs,

- v -

EAST TWENTY SIXTH ASSOCIATES,

Defendant.

**DECISION & ORDER AFTER
TRIAL**

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In this action plaintiffs, commercial tenants sued defendant, their landlord for breach of contract, unjust enrichment, constructive eviction, and breach of the covenant of quiet enjoyment. Plaintiffs as tenants and defendant as landlord entered into a lease dated June 16, 2009 commencing on July 1, 2009 and expiring on December 31, 2014 for Room 1600 and a lease dated August 24, 2009 commencing on September 1, 2009 and expiring on December 31, 2014 for Room 1601 (the leases) in the defendant's building known as 11-13 East 26th Street, New York.

A bench trial was conducted on June 16th, 17th, and 21st and July 15th and 16th, 2021 on plaintiffs' breach of contract and breach of the covenant of quiet enjoyment causes of action¹ concerning their complaints about construction noise, dirty windows, bathroom conditions, malfunctioning radiators and a lack of heat and air conditioning.

¹ Plaintiffs withdrew their other two causes of action for unjust enrichment and constructive eviction (6-16-21 tr 4:3-12).

FINDINGS OF FACT

Construction Noise

The building superintendent Anthony Cunsolo testified that for “probably a week” in August 2010 demolition work was performed at night on the 17th floor but conceded that the only entry in the building’s logbook for trades people working in the building doing demolition work on the 17th floor is for Saturday September 18, 2010 (7-15-21 tr 32:17; 34:7-16; 60:21-24; and 83:23 – 86:7; Ex N). Kenneth Walsh, Assistant Director of Operations for Adams & Co. Real Estate, LLC (Adams & Co.) (the managing agent for the building) testified that the demolition work was only done at night for three to four nights (7-16-21 tr 32:6-9).

Plaintiffs’ principal Ralph Klein testified that in August 2010 he went to the 17th floor and saw demolition work being done (6-16-21 tr 26:01 – 27:12) and on August 27, 2010 he emailed James Buslik a principal with Adams & Co. Real Estate, LLC (Adams & Co.) (the managing agent for the building [6-21-21 tr 54:01-17]) that the construction noise emanating from the 17th floor was preventing plaintiffs from being able to work (Exs 8 and 9). Klein testified that he also complained to Walsh but nothing was done (6-16-21 tr 28:3-15 and 29:5-11). Klein also testified that the noise was so disruptive he and plaintiffs’ staff had to work elsewhere (6-16-21 tr 33:17-22).

Cunsolo testified that following the demolition work the 17th floor was “white boxed” which consists of scraping old plaster, re-plastering, and painting everything white (7-15-21 tr 34:23 and 42:1-4). The “white boxing” phase of the work on the 17th floor took about a month (7-15-21 tr 42:10). According to Cunsolo, the “white boxing” phase was then followed by the “lay-out” phase when carpenters snap chalk lines on the floor indicating where walls are going to be according to the plans for the next phase, the “buildout phase” (7-15-21 tr 42:17 25). Most of

the construction of the build out occurred between late January 2011 through the end of March 2011 (7-15-21 tr 47:8).

Cunsolo testified that during the “buildout phase” the concrete floors on the 17th floor were refurbished with a “shot blasting” machine at night or on the weekends (7-15-21 tr 44:1 – 46:1; 114:22 – 115:15; and 81:22 – 82:6). The concrete floor was also cut into for “trenching or running electrical conduit” (7-16-21 tr 8:4 – 18). To build the walls on the 17th floor metal studs were used that were screwed into metal tracks that were attached to the concrete floor using a nail gun. This work was also not done during normal business hours (7-15-21 tr 79:21- 81:2). According to Walsh wood flooring and raised wood flooring was installed in approximately 10 – 15% of the space on the 17th floor with some of this work being done during normal business hours (7-16-21 tr 4:9 – 5:15). Other work done during the buildout of the 17th floor included electrical and plumbing work (7-16-21 tr 2:23 – 3:6), carpet installation (7-16-21 tr 3:9 – 17), and sheetrock installation and painting (7-15-21 tr 112:19 – 113:5). According to Walsh during normal business hours the only work that occurred on the 17th floor involved securing screws and hammering (7-15-21 tr 115:2-5). According to Cunsolo work on the 17th floor was completed by the end of March, 2011 with some finishing work or “punch list items” being addressed in April and May 2011(7-15-21 tr 47:8 – 48:7; 56:11 – 17).

Plaintiffs complained about the construction noise emanating from the 17th floor by emails on February 4, 2011 (Ex 7) and March 11, 15, and 16, 2011 (Ex 5). On March 8 and 16, 2011 Klein visited the 17th floor and recorded the construction activity with his phone (Ex11; 6-16-21 tr 109:23 – 110:18). Cunsolo testified that plaintiffs complained about the construction noise coming from the 17th floor between January 2011 and March 2011. Cunsolo responded to plaintiffs’ complaints by asking the workers on the 17th floor to either move to the other side of

the building or asking them to try to be quieter (7-15-21 tr 50:3-24). Klein testified that as a result of the construction noise plaintiffs were forced to reschedule and cancel meetings which hurt plaintiffs' reputation (6-16-21 tr 81:22 – 82:9). In support of plaintiffs' claim for damages, Klein prepared a spreadsheet purporting to document rescheduled and canceled meetings for the period from the end of August 2010 to the end of August 2011. A column included on plaintiffs' spread sheet is labeled "Proportional Damages" assigning a dollar amount to rescheduled or cancelled meetings (Ex 10). Klein testified that these amounts represent loss of reputational value to plaintiffs, an assessment of what he thinks is the correct amount but he conceded that the calculation is "not a science" (6-16-21 tr 94:23 – 99:19). Klein further conceded that there were mistakes in the Proportional Damages column because he had allocated damages twice for a rescheduled meeting and he did not know which entries were entered in error (6-16-21 tr 87:8 – 88:3).

Complaints About Windows

By email dated December 28, 2009 Klein complained to Walsh about the leased premises' dirty windows (Ex 17). Walsh testified that he recalled plaintiffs complaining about the condition of windows and that he made arrangements to have the windows cleaned quarterly as required under the parties' leases (7-16-21 tr 23:18 - 24:19). Klein testified that the dirty windows conveyed an unprofessional image negatively impacted plaintiffs' business (6-21-21 tr 28:8-20).

Complaints About Heat and Radiators

By emails dated December 28, 2009 and March 12, 2010 Klein complained to defendant about the noise and hot water coming from the radiators (Ex 17 and 6). Klein testified that

sometimes the heat did not work compelling plaintiffs to purchase space heaters for its employees to use in their workspaces (6-16-21 tr 24:5-9).

Walsh explained that the building runs on a one-pipe heating system connected to a system that turns the heat on based on the temperature outside, steam then rises throughout the building to cast iron radiators (7-16-21 tr 24:25 – 25:8). In December 2009 defendant did replace two faulty radiator air valves and “re-pitched the radiators” in plaintiffs’ premises (Ex 17). But both Walsh and Cunsolo testified that in response to plaintiffs’ complaints about the lack of heat they would check the radiators in plaintiffs’ premises and find that some of the radiator valves had been turned off causing the premises to have no heat (7-16-21 tr 25:9-15; 7-15-21 tr 51:18-22). Klein testified that the heat issues made it extremely difficult to work and conveyed an unprofessional image of plaintiffs, negatively impacting their business (6-21-21 tr 28:21 – 30:4) but conceded that eventually the issues with the heat were resolved and confirmed that it took a few days (6-16-21 tr 57:20 58:6).

Complaints About the Bathrooms

By email dated December 28, 2009 Klein complained about the lack of toilet paper in the men’s room (Ex 17). Consolo testified that when he inspected the bathrooms, he found wet toilet paper stuck to the ceilings and urine on the floor. And that as a result he increased the cleaning schedule from two times a day to four times a day (7-15-21 15-21 tr 54:18 – 55:11). Klein testified that there was a water leak in the bathroom ceiling (6-16-21 tr 36:2-12) but conceded nothing was damaged (7-17-21 tr 8:18). According to Klein the condition of the bathrooms conveyed an unprofessional image and negatively impacted plaintiffs’ business (6-21-21 tr 27:12-20).

Complaints About Air Conditioning

Klein testified that he complained about the air conditioning a number of times (6-16-21 tr 19:10-17), that during the summer of 2009 the air conditioner did not work for “a number of hours” “about three [or] four times” (*id.* 21:22-25) and during the summer of 2010 the air conditioner did not work “days here, days there” he didn’t “know how many days” (*id.* 21:22-25). Buslik recalled that plaintiffs complained about the lack of air conditioning (6-21-21 tr 99:14). Cunsolo testified that after receiving a phone call about the air conditioning from plaintiffs he went to plaintiffs’ premises and was told the air conditioner in the kitchen was not working. When Cunsolo went to the kitchen he discovered “oil all over the floor and a lot of wires cut in the unit” and after alerting plaintiffs to this condition he was asked to leave plaintiffs’ premises (7-15-21 tr 53:2-16). According to Klein the lack of air conditioning created a difficult work environment and conveyed an unprofessional image of plaintiffs, negatively impacting their business (6-21-21 tr 28:21 – 29:4).

DISCUSSION

Breach of Contract

Article 4, entitled Repairs of the parties’ leases provides in relevant part:

Except, as specifically provided in Article 9 or elsewhere in this lease, there shall be no allowance to Tenant for a diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner, Tenant or others making or failing to make any repairs alterations, additions or improvements in or to any portion of the building or the demised premises, or in and to the fixtures, appurtenances or equipment thereof.

(Exs 2 and 3). Article 9 is inapplicable here because it pertains to instances where the premises or a part of the premises is damaged by fire or other casualty. There was no evidence at trial of a fire or other casualty. The First Department “has repeatedly enforced exculpatory clauses [such

as this one] related to business interruption losses” (*Chaitman v Moezinia*, 178 AD3d 642, 643 [1st Dept 2019]). Indeed, in *American Youth Dance Theater, Inc. v 4000 E. 102nd St. Corp.*, the Court held that “Article 4 of the parties’ lease precludes plaintiff from claiming the damages it seeks [for breach of contract] . . . or for liability on defendant’s part for any inconvenience, annoyance or injury to business arising from defendant’s failure to make repairs” (181 AD3d 486, 487 [1st Dept 2020]).

Moreover, Article 20 entitled Building Alterations and Management provides in relevant part:

There shall be no allowance to Tenant for diminution of rental value and no liability on the part of Owner by reason or inconvenience, annoyance or injury to business arising from Owner or other Tenant making any repairs in the building or any such alterations, additions and improvements.

(Exs 2 and 3). Again, the unequivocal exculpatory language in Article 20 bars plaintiffs’ claim for lost profits due to the conditions in the premises (*Chaitman*, 178 AD3d at 643; *see also Bd. of Managers of the Saratoga condo. v Shuminer*, 148 AD3d 609, 610 [1st Dept 2017] [holding *inter alia* that exculpatory provisions in commercial lease barred tenant’s claim for lost profits]).

Even if plaintiffs could get over the hurdles imposed by Articles 4 and 20 of the leases, their claim for lost profits as a result of defendant’s alleged breach of the leases would still fail because plaintiffs have failed to establish that compensation for lost profits “ were within the contemplation of the parties at the time the [leases were] entered into” (*Ashland Management v Janien*, 82 NY2d 395, 403 [1993]; *Datalot, Inc. v Winum Enterprises, LLC*, 146 AD3d 653 [1st Dept 2017] [holding lost profits recoverable because explicitly mentioned in the agreement thereby establishing that lost profits were within the contemplation of the parties when they entered into the agreement]). Finally, even if plaintiffs had gotten over the hurdles imposed by Articles 4 and 20 and shown that damages for lost profits were contemplated by the parties when

they entered into the leases, plaintiffs have failed to prove any damages with reasonable certainty (*Ashland Management*, 82 NY2d at 403 [damages must be “capable of measurement with reasonable certainty”]). Plaintiffs’ claim for lost profits in an amount that Klein thinks is “right” is speculative at best.

Accordingly, plaintiffs’ breach of contract claim will be dismissed.

Breach of the Covenant of Quiet Enjoyment

While not mentioned by the parties Article 23 of the parties’ leases entitled Quiet Enjoyment provides in pertinent part that:

Owner covenants and agrees with Tenant that upon Tenant paying the rent and additional rent and observing and performing all the terms, covenants and conditions, on Tenant’s part to be observed and performed, Tenant may peaceably and quietly enjoy the premises hereby demised, subject, nevertheless, to the terms and conditions of this lease . . .

(Exs 2 and 3).

In action for breach of the covenant of quiet enjoyment a tenant must show that there is either an actual or a constructive eviction and that the tenant has performed all the covenants in the lease which are conditions precedent to their right to insist upon the covenant unless the conditions precedent have been waived by the landlord (*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]; *TDS Leasing, LLC v Tradito*, 148 AD3d 1079, 1080 – 1081 [2nd Dept 2017]).

Here there was no actual eviction because the evidence at trial establishes “that at all relevant times plaintiff[s] remained in full possession of the leased premises” (*127 Restaurant Corp. v Rose Rlty. Grp., LLC*, 19 AD3d 172, 173 [1st Dept 2005]). To the extent that a breach of the covenant of quiet enjoyment cause of action may be predicated on a constructive eviction, plaintiffs withdrew their constructive eviction cause of action. Even if plaintiffs had not withdrawn their constructive eviction cause of action, their claim for breach of the covenant of

quiet enjoyment predicated on a constructive eviction would fail because the evidence at trial did not establish that plaintiffs abandoned the premises (*Dave Herstein Co.*, 4 NY2d at 121; *127 Restaurant Corp.*, 19 AD3d at 173) or a portion thereof. Nor did the 17th floor renovation work, heating, air conditioning, bathroom, and windows issues, substantially and materially deprive plaintiffs of the beneficial use and enjoyment of the premises (*cf. Bostany v Trump Organization LLC*, 88 AD3d 553, 554 [1st Dept 2011]). Finally, plaintiffs failed to establish that they performed all the conditions precedent to maintaining a cause of action for breach of the covenant of quiet enjoyment, namely that they paid the rent or that there was a waiver of those conditions (*id.*; *accord TDS Leasing, LLC v Tradito*, 148 AD3d 1079, 1081 [2nd Dept 2017] [holding *inter alia* tenant failed to make a prima facie showing on his breach of the covenant of quiet enjoyment claim by demonstrating he performed all the conditions precedent or that there was a waiver of those conditions]). Indeed, the petitions and the decisions in defendant's favor on motions for summary judgment in the two summary proceedings defendant brought against plaintiffs establish that plaintiffs did not pay rent for at least the period March 2011 through June 2011 (Exs B, C, E and F).

Accordingly, plaintiffs claim for breach of the covenant of quiet enjoyment will be dismissed.


CONCLUSION

Based on the foregoing it is

ORDERED that the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant with costs and disbursements as taxed by the Clerk to defendant; and it is further

ORDERED that the parties are directed to retrieve their exhibits from Part 47 (111 Centre St., Rm. 1021) within 30 days of this decision and order or the exhibits will be discarded.


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DATE: 3/9/2022

PAUL A. GOETZ, JSC

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify _____)