Congregation Beth Shalom of Kingsbay v Lev Bais Yaakov

2022 NY Slip Op 31463(U)

May 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 4652/2009

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of May, 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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CONGREGATION BETH SHALOM OF KINGSBAY,

Plaintiff,

-against-

LEV BAIS YAAKOV, M.Y. DEVELOPMENT GROUP, LLC and PHILADELPHIA INDEMNITY INSURANCE COMPANIES,

Defendants.

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Index No.: 4652/2009

In this matter, plaintiff, Congregation Beth Shalom of Kingsbay ("plaintiff"), moves by notice of motion (Motion Seq. 14) for summary judgment on its First, Second and Fourth causes of action against defendant, Lev Bais Yaakov ("Lev Bais"), and for an order dismissing the defendant's counterclaims against plaintiff. Plaintiff further moves by notice of motion (Motion Seq. 15) for leave to conduct an examinations before trial of Mark Spitzer, who plaintiff claims was first disclosed in Lev Bais's opposition to the aforementioned motion for summary judgment and David Thause, who a predecessor justice previously precluded plaintiff from producing by order dated April 1, 2019.

Plaintiff commenced this matter by the filing of a Summons with Notice and Verified Complaint on February 25, 2009, as amended on or about October 15, 2009. Plaintiff alleges that it entered into a written agreement with Lev Bais, a religious school, on or about April 17, 2000, to lease a portion of the premises known as 2710 Avenue X,

Brooklyn, New York 11235 ("the building"). Plaintiff asserts that Lev Bais engaged a third-party, M.Y. Development Group, LLC ("MY Development"), to construct classrooms on the roof of the building without obtaining plaintiff's prior written consent pursuant to the lease. Plaintiff asserts that MY Development's negligent and deficient construction caused a leak that resulted in water damage to the premises after a series of severe rain storms in August and September 2008. Plaintiff alleges that Lev Bais is liable for the water damage that resulted from MY Development's negligent construction and further, that Lev Bais breached the lease agreement by failing to name plaintiff as an additional insured under its general liability policy with Philadelphia Indemnity Insurance ("PIC"). Plaintiff seeks damages of $350,000 based upon the above claims. Further, plaintiff contends that Lev Bais owes use and occupancy in the amount of $1,500 per month (totaling $12,000) for the period that Lev Bais used and occupied the roof, from January 2009 through August 2009. Plaintiff also claims that it is entitled to a judgment totaling $86,04696 for unpaid rent and additional rent that Lev Bais failed to pay before surrendering the premises on August 31, 2009.

In opposition, Lev Bais points out that plaintiff's application, supported solely by its attorney's affirmation, is without evidence in admissible form. Lev Bais also annexed the affirmation of Rabbi Shmiel Deutsch, who affirms, under the penalties of perjury, that plaintiff breached the lease agreement in the first instance, by failing to maintain the premises, failing to provide heat, and withholding janitorial services, which resulted in the constructive eviction of Lev Bais. Lev Bais contends that there also exists material issues of fact concerning the cause of the water damage, since plaintiff employed another company to address issues with the roof immediately prior to the construction project. Additionally, Lev Bais contends that plaintiff submitted a claim with PIC that resulted in a pay out, as evinced by plaintiff's discontinuance of its claims against PIC herein.

The proponent of a summary judgment motion 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 (*Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 []; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404). Evidence tendered by the moving party must be in admissible form (*Friends of Animals v Associated Fur Mfrs*, 46 NY2d 1065, 1067 [1979].), and the moving party's failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Center*, 64 NY2d at 853]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d at 562).

Here, plaintiff has failed to demonstrate prima facie entitlement to summary judgment on its breach of contract claim against Lev Bais. Paragraph 13 of the lease provides, in pertinent part, that "the Yeshiva may install gates and/or other safety devices on the roof as may be required, at its own expense and shall submit plans to [plaintiff] prior to any construction or installation (NYSCEF Doc. No. 32). Contrary to plaintiff's contention, this contractual provision does not require prior written permission but rather, the provision requires Lev Bais to submit plans to plaintiff before commencing construction. Further, though not specifically stated, plaintiff's first cause of action also sets forth a theory for recovery against Lev Bais under vicarious liability for the negligent construction performed by MY Development. However, the court finds that plaintiff has failed to demonstrate, prima facie, that Lev Bais should be held vicariously liable for the acts of MY Development. Plaintiff has not established MY Development's negligence

through proof in admissible form (*Francesco v Empress Ambulance Serv., Inc.*, 100 AD3d 589, 590-591 [2d Dept 2012]; *Holt v Holt*, 262 AD2d 530, 530 [2d Dept 1999]; *see also Friends of Animals*, 46 NY2d at 1067-1068). Additionally, plaintiff's motion is without the affidavit of an expert who distinguishes the work performed by the company hired by plaintiff to repair the roof, from the construction work performed by MY Development. The affidavit of Anthony Levy ("Mr. Levy") also fails muster, because he is neither qualified as an expert, nor does Mr. Levy possess personal knowledge of the events leading up, during, and after the water leaks occurred between August and September 2008. Mr. Levy's lack of personal knowledge is evinced by multiple hearsay statements in his affirmation. It should also be noted that Mr. Levy works for the company that repaired plaintiff's roof and consequently, the court is not persuaded that Mr. Levy's opinions are without bias. Plaintiff also included the affirmation of David Thause, which the court declines to consider, since a predecessor justice precluded plaintiff from using testimonial, or other, evidence procured from Mr. Thause (NYSCEF Doc. No. 64).

Additionally, the court finds that material issues of fact preclude an award in plaintiff's favor on its second cause of action for fair market, use and occupancy of the roof during Lev Bais's lease term. It is well understood that an occupant's duty to pay use and occupancy is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties (*Eighteen Associates, LLC v Nanjim Leasing Corp.*, 257 AD2d 559 [2d Dept 1999] *quoting* 1 Williston, Contracts § 3A, at 13 [3d ed 1961]), and the Appellate Division, Second Department has held that a party may not recover in quantum meruit where the parties have entered into a contract which governs the subject matter (*Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 63 AD3d 141 [2d Dept 2009] *citing Eighteen Assoc. v*

Nanjim Leasing Corp., 257 AD2d 559 [2d Dept 1999]). In this case, the parties do not dispute that Lev Bais's tenancy was covered by a valid and enforceable lease agreement. Lev Bais's use of the roof and its construction of classrooms on the roof are specifically addressed under the License and Pledge Agreement/Rider included with plaintiff supporting documentation (NYSCEF Doc No. 32).

Plaintiff's fourth cause of action is for unpaid rent and additional rent arrears pursuant to the lease, through the date Lev Bais surrendered the premises on August 31, 2009. Lev Bais is contractually obligated to pay such rent; however, Lev Bais has asserted affirmative defenses and counterclaims that may have a mitigating impact on the amount, if any, of rent arrears plaintiff is entitled to recover. Thus, the court finds that plaintiff is entitled to summary judgment on its claim to recover unpaid rent and additional rent. However, that claim shall be addressed at trial and subject to Lev Bais's defenses and counterclaims, as well as prior orders precluding plaintiff from producing certain testimonial and documentary evidence.

In addressing plaintiff's discovery-related motion, the court finds that plaintiff is entitled to conduct an examination before trial of Mark Spitzer, who asserted by affirmation dated October 1, 2020, that he possessed personal knowledge about the condition of the roof prior to plaintiff's repair, Lev Bais's construction of classrooms thereon, and the water damage that occurred between August and September 2008. That branch of plaintiff's motion requesting permission to produce David Thause is denied based on the April 1, 2019 preclusion order.

Any arguments raised by the parties and not addressed herein are either moot or academic.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment (Motion Seq. 14) is granted solely to the extent that plaintiff is entitled to summary judgment on the issue of liability, subject to the affirmative defenses and counterclaims asserted by defendant, Lev Bais Yaakov, at a trial on damages, taking into account any preclusion orders issued herein, and it is further

ORDERED, that plaintiff's motion for discovery-related relief (Motion Seq. 15) is granted solely to the extent that plaintiff may depose Mark Spitzer, within thirty (30) days of service of a copy of this order with notice of entry upon all parties.

This constitutes the decision and order of the court.

E N T E R,

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice