

Brocho V.H. LLC v Avant Gardner LLC
2022 NY Slip Op 32416(U)
July 18, 2022
Supreme Court, Kings County
Docket Number: Index No. 517698/2020
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BROCHO V.H. LLC,

Plaintiff,

Decision and order

- against -

Index No. 517698/2020

AVANT GARDNER LLC,

Defendant,

July 18, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff moves pursuant to CPLR §3212 seeking summary judgment to establish the lease it entered into with the defendant commenced and that the defendant breached the lease by failing to pay rent. Additionally, the plaintiff seeks to enforce a waiver clause and bar the defendant from raising any defenses other than payment. The defendant opposes the motion, arguing that the plaintiff failed to satisfy its burden of proof and that there are questions of fact. All parties submitted papers, and after reviewing the arguments of all parties, this court now makes the following determination.

Background

On August 1, 2019, plaintiff-landlord and defendant-tenant signed a 10-year lease agreement in connection with a property located at 538 Johnson Avenue, Brooklyn, New York. The lease contained a clause which stated that "the term was to commence when the Landlord delivers the Premises to Tenant with the Landlord's Work Substantially Completed" (see, Lease, page 1).

Further, Exhibit B annexed to the lease defines "Landlord's Work" meaning that the Landlord shall deliver the space in 'as-is' condition including in the following conditions "vacant, broom-swept with all personal property removed" and "all windows replaced as per Landlord's current plans for site" (id., at Exhibit B).

The defendant paid rent from August 2019 until April 2020 but stopped paying rent from April 2020 until the plaintiff re-entered the property on July 31, 2020. The defendant alleges that the "condition precedent" of the lease was not triggered because the plaintiff did not deliver the property as described in the lease agreement, and thus their obligation to pay rent did not commence. Specifically, defendant alleges that the plaintiff had construction materials on the property and the plaintiff did not repair the windows. The plaintiff, however, disputes this and claims they fully delivered the property to the defendant and is owed the unpaid rent.

The plaintiff now moves seeking summary judgment arguing the defendant signed a waiver clause and waived its right to invoke any defenses other than payment. Additionally, the plaintiff contends that because the defendant paid rent from August 2019 until April 2020, plaintiff accepted the property's condition and waived any defenses they may have regarding the improper condition of the property. As noted, the defendant opposes the motion on the

grounds that there are questions of fact that foreclose a summary determination.

Conclusions of Law

A court can grant Summary Judgment where the movant establishes sufficient evidence, which would compel the court to grant judgment in his or her favor as a matter of law. However, where material facts in a case are in dispute, summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]).

Generally, it is for the jury, the trier of fact, to determine the legal cause of any injury (Aronson v. Horace Mann-Barnard School, 224 AD2d 249, 637 NYS2d 410 [1st Dept., 1996]). However, where the court can only draw one conclusion from the facts, the trial court may decide the legal issue as a matter of law (Derdiarian v. Felix Contracting Inc., 51 NY2d 308, 434 NYS2d 166 [1980]).

Thus, to succeed on a motion for summary judgment, the movant must make a prima facie showing of an entitlement as a matter of law by offering evidence demonstrating the absence of any material issue of fact (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316 [1985]). Moreover, a movant cannot succeed upon a motion for summary judgment by pointing to gaps in the opponent's case, because the moving party

must affirmatively present evidence demonstrating the lack of any questions of fact (Velasquez v. Gomez, 44 AD3d 649, 843 NYS2d 368 [2d Dept., 2007]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id).

There is no dispute the defendant stopped paying rent in April 2020. The defendant argues that condition precedents, namely the performance of certain work by the landlord and the obligation to provide broom clean premises were never fulfilled, which means the rental obligations never even commenced. Thus, there are surely questions of fact whether the plaintiff breached the lease.

It is well settled that a condition precedent is an "act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises" (Oppenheimer & Company Inc., v. Oppenheim, Appel, Dixon and Co., 86 NY2d 685, 636 NYS2d 734

[1995]). Thus, a condition precedent is an act or an event that must occur before the obligations of the parties become operative. If such condition is not fulfilled then the parties are excused from performing under the contract. For example, where a broker maintains a contract for the commission of a fee upon closing of title a condition precedent to the contract requires the title actually close (Levy v. Lacey, 22 NY2d 271, 292 NYS2d 455 [1968]). Likewise, in 1710 Realty, LLC v. Portabella 308 Utica, LLC, 189 AD3d 944, 138 NYS3d 523 [2d Dept., 2020] the court determined that a landlord's duty to provide property in "broom clean" condition is a valid condition precedent and only when satisfied does the lease commence.

There are cases that hold that a landlord, by accepting rent, thereby waives any defaults regarding conduct that is required of the tenant (see, Atkins Waste Materials Inc., v. May, 34 NY2d 422, 358 NYS2d 129 [1974]). There is no reason why this rule should not apply in a reciprocal situation, thus, the tenant, by paying rent thereby waived any defaults concerning conduct required of the landlord. Therefore, in general, a waiver, which is the relinquishment of a right, can be voluntarily agreed upon by either party (Jefpaul Garage Corp., v. Presbyterian Hospital, 61 NY2d 442, 474 NYS2d 458 [1984]). Thus, a waiver is unilateral and "not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the

party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform" (Nassau Trust Co., v. Montrose Concrete Products Corp., 56 NY2d 175, 451 NYS2d 663 [1982]). In Stassa v. Stassa, 123 AD3d 804, 999 NYS2d 116 [2d Dept., 2014] the court held that where a continuing obligation between two parties exists and one party waived their rights, that party's filing of a summons and complaint in an action to assert those same rights is indicative that such waiver was withdrawn.

Therefore, even if such reciprocity exists the tenant had the right to withdraw its waiver of the landlord's obligations. There are surely questions of fact whether the tenant's refusal to continue paying rent in April 2020 was an effective withdrawal of its waiver. While the unforeseen shut-down in the wake of the COVID-19 pandemic surely contributed to the tenant's decision there is evidence that was not the only factor. Thus, in an email dated April 21, 2020 the tenant notified the plaintiff that besides COVID-19 there were other issues that needed to be discussed including "permit, environmental, vandalism, safety, allowing construction in our space, etc" (see, E-mail sent on April 21, 2020 at 11:32 AM). Further, there is really no dispute the landlord never fulfilled the conditions precedent even after the tenant stopped paying rent. Therefore, there are potential questions of fact whether the waiver that had existed was validly

withdrawn. Consequently, the motion seeking summary judgement is denied.


However, the motion seeking to dismiss the defendant's affirmative defenses and counterclaims is granted. Article 51 of the lease states that the "Tenant shall and does hereby waive its right (and agrees not) to interpose any defense (other than defense of payment), counterclaim or setoff, of whatever nature or description, in any proceeding or action that may be initiated by Landlord against Tenant to recover rent, additional rent or other charges reserved herein and/or for possession or damages and/or in connection with any matter or claim whatsoever arising out of or in any way connected with this Lease, or any renewal, extension, holdover or modification thereof, or the relationship of Landlord and Tenant or Tenant's use or occupancy of the demised premises, except for any compulsory counterclaims that cannot be brought in a separate action" (id). In the absence of fraud a waiver of the right to waive any set-off or counterclaim is not against public policy and is enforceable (see, Weiss v. Phillips, 157 AD3d 1, 65 NYS3d 147 [1st Dept., 2017]). Indeed, the case cited by the defendant Federal Deposit Insurance Corp., v. Marino Corp., 74 AD2d 620, 425 NYS2d 34 [2d Dept., 1980] specifically states that "a waiver of the right to assert a setoff or counterclaim is not against public policy and has been enforced by this court" unless fraud or negligence is alleged

(id). The basis for those exceptions is prevent a party from shielding itself from its own tortious conduct. None of the affirmative defenses asserted allege fraud or other viable torts wherein enforcing the waiver provision would result in the plaintiff here being shielded from its own torts. Moreover, the defendant does not assert the defense of payment. Therefore, there are no viable defenses and consequently the motion seeking to dismiss the affirmative defenses is granted.

So ordered.

ENTER:

DATED: July 18, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC