

Andrianna Shamaris, Inc. v 121 Varick St., Corp.
2022 NY Slip Op 32625(U)
August 3, 2022
Supreme Court, New York County
Docket Number: Index No. 154316/2021
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33

Justice

-----X

ANDRIANNA SHAMARIS, INC.,

Plaintiff,

- v -

121 VARICK STREET, CORP., IRENE DAVID REALTY, INC., POSITIVE PRINT LITHO OFFSET, INC.

Defendant.

-----X

INDEX NO. 154316/2021

MOTION DATE 7/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Oral argument took place for the above captioned motion on July 28, 2022 with Robert J. Howard appearing for Plaintiff and Alexander Rabinowitz appearing for Defendant Varick 121 Varick Street, Corp. ("Varick"). Upon the foregoing documents and oral argument, it is decided and ordered as follows.

I. Factual and Procedural Background

Plaintiff is a commercial tenant who runs a luxury home specialty store located at 121 Varick Street (NYSCEF Doc. 1). Plaintiff and Varick executed a commercial lease (the "Lease") in January of 2019 to utilize a portion of the ground floor retail space (the "Premises") as an "upscale furniture showroom." (NYSCEF Doc. 20). 121 Varick Street (the "Building") sits atop the subway under Varick Street and is at the mouth of the Holland Tunnel ("NYSCEF Doc. 33). It also is located in what has historically been known as New York's "printing district" and the Building has a history of housing printing presses ever since seven printing companies formed the

Plaintiff took possession of the leased premises in October 2019 (NYSCEF Doc. 12). The Lease contains a clause that states that so long as Tenant is not in default, then “Tenant may peaceably and quietly enjoy the premises without hinderance or molestation by Landlord or any person lawfully claiming by, through or under Landlord...”. (NYSCEF Doc. 20). Plaintiff alleges that Defendant Irene David Realty, Inc. (“Realty”) owns the space above the unit leased by Plaintiff and subleases that space to Defendant Positive Print Litho Offset, Inc. (“Print”) (NYSCEF Doc. No. 1 at ¶¶ 10-12).

Plaintiff alleges that Varick and Realty allowed Print to move a printing press to be operated all day during business hours Monday through Friday directly above Plaintiff’s showroom (*Id.* at ¶ 19). Plaintiff alleges that the printing press and cutting machine caused continuous noises which made it impossible for Plaintiff to use its leased premises for its intended purposes, resulting in lost business (*Id.* at ¶¶ 20-22). Plaintiff alleges that after making complaints to Varick, it was told a noise remediation plan would be put into effect; however, the noise had not been remediated (*Id.* at ¶¶ 26-27). Plaintiff states that the noise caused Plaintiff’s employees (Andrianna Shamaris and her son, Royston Redmond) to have excruciating headaches. (NYSCEF Doc. 12 at ¶ 2). After numerous complaints, a site inspection was held on January 20, 2021 with Print and Varick’s property manager wherein Plaintiff was told that a mitigation plan was in progress and that Print was relocating to a new building. (*Id.* at ¶ 26).

Plaintiff then retained Alan Feierstein of Acoustilog, Inc. (“Acoustilog”) to record and analyze the noise emanating from Print. Acoustilog found that the noise levels exceeded noise limits set forth by New York City’s noise ordinance. (NYSCEF Documents 13, 23). Plaintiff remains in possession of the premises and continues to use it as a showroom, to receive furniture, and to ship furniture (NYSCEF Documents 33 at ¶ 75 and 39 at ¶ 6).

Plaintiff filed a Complaint initiating this action on May 4, 2021 claiming breach of the covenant of quiet enjoyment, breach of the implied covenant of good faith, constructive eviction, nuisance, injunctive relief, rescission, and restitution. (*Id.*) Defendants filed Answers denying Plaintiff's allegations and asserting cross-claims and affirmative defenses. There has not yet been a preliminary conference in this matter.

Plaintiff now moves for partial summary judgment (1) declaring defendant 121 Varick Street Corp. ("Varick") to be in material breach of its express covenant of quiet enjoyment contained in the commercial lease executed between Plaintiff and Varick (the "Lease"); (2) cancelling and rescinding the Lease based on Varick's breach, failure of consideration, and fraud, and (3) awarding judgment in the amount of \$105,472 representing rent paid under the Lease for periods since commencement of this action.

The motion is opposed by Varick and Realty on numerous grounds including (1) Plaintiff has failed to show there are no genuine issues of material fact requiring a trial; (2) Plaintiff's motion is procedurally defective for failing to comply with 22 N.Y.C.R.R. § 202.8-g, and (3) Plaintiff's motion is premature as there has been no discovery or preliminary conference in this action since submission of the motion. Realty sold their ownership interest of the premises above Plaintiff's showroom and Print is no longer a tenant of the Building (NYSCEF Doc. 45).

II. Discussion

"Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]).

moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]).

Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. See e.g., *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see *Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

To establish a breach of a covenant of quiet enjoyment, a Plaintiff must show that Varick’s conduct substantially and materially deprived defendant of the beneficial use and enjoyment of the premises or that Plaintiff was actually evicted or abandoned possession of the leased premises (*International Development Institute, Inc. v Westchester Plaza, LLC*, 194 AD3d 411, 412 [1st Dept 2021]; *River Park Associates (1972) L.P. v Richman Plaza Garage Corp.*, 178 AD3d 422, 424 [1st Dept 2019]; *Rivera v JRJ Land Property Corp.*, 27 AD3d 361, 365 [1st Dept 2006]; *Finkelstein v Levinson*, 74 Misc2d 105, 108 [Civ Ct, 1973]).

To establish entitlement to rescission on the basis of fraud, a party must set forth the circumstances of the fraud in detail showing that the other party made a false material representation that the party relied upon it to its detriment and that reliance upon the misrepresentation must have been justifiable (*361 Broadway Associates Holdings, LLC v Morales*, 195 AD3d 497, 498 [1st Dept 2021]; *Kalivia Food Corp. v Hunts Point Co-Op. Market, Inc.*, 244 AD2d 460, 461 [2d Dept 1997]). A party cannot claim justifiable reliance on a defendant’s misrepresentations if the party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence (*Rosenblum v Glogoff*, 96 AD3d 514, 515 [1st Dept 2012]).

At the present time, no preliminary conference has been held and the Court find's Plaintiff's motion for summary judgment to be premature. First, it is undisputed that Plaintiff has continued to use the premises "including using the freight elevator, receiving and/or shipping deliveries, and having guests and/or customers in the space" (NYSCEF Doc. 39 at ¶ 6). To the extent it is disputed how often Plaintiff is using the premises, or to what extent she was not using the premises due to alleged noise from the printing press, those are material issues of fact that are in dispute which warrants denial of summary judgment. Moreover, Plaintiff touts itself as "appointment only", so an inference can be made in favor of Defendants that Plaintiff was not at the premises merely because appointments were not scheduled (NYSCEF Doc. 12 at ¶5). Therefore, at this stage of litigation, and viewing all facts in favor of the non-moving party, Plaintiff has not met its prima facie burden of proving a breach of the express covenant of quiet enjoyment because Plaintiff has not adequately shown that it is undisputed that it abandoned the premises because of the alleged noise from the printing press.

Likewise, Plaintiff has not met its prima facie burden entitling it to rescission of the lease. Even if there were misrepresentations or "active concealment" made regarding the existence of a printing press on the second floor, it is hotly contested whether Plaintiff justifiably relied on such misrepresentations or active concealment, especially when the numerous facts have been brought up which would show that Plaintiff could have discovered the existence of the printing press with due diligence¹ (*ACA Financial Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]; *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 85-86 [1st Dept 2017]; 1810

¹ It is alleged that Plaintiff has been a tenant in the neighborhood for years prior to this action, Plaintiff's real estate broker is alleged to be a "seasoned expert in the Printing District", the defendant Varick was formed by seven printing companies as shown on NY Times website, and a directory on the ground floor lobby of the Building listed all of the printing operations in the Building, including Defendant Print's operation on the second floor. (NYSCEF Doc. 33 at ¶¶ 29-30, 33-35).

E&J Restaurant Corp. v Red and Blue Parrot, Inc., 150 AD3d 648, 648-649 [2d Dept 2017]; Rosenblum v Glogoff, 96 AD3d 514, 515 [1st Dept 2012] [“where party has means to discover transaction’s true nature by exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant’s misrepresentations.”]. Therefore, Plaintiff’s motion for summary judgment must be denied.

Accordingly, it is hereby

ORDERED that Plaintiff’s motion for summary judgment is denied in its entirety, without prejudice.

This constitutes the Decision and Order of this Court.

8/3/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: