

Chrysler E. Bldg., L.L.C. v Abelman Frayne & Schwab
2022 NY Slip Op 32693(U)
August 9, 2022
Supreme Court, New York County
Docket Number: Index No. 156456/2021
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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CHRYSLER EAST BUILDING, L.L.C,
Plaintiff,

- v -

ABELMAN FRAYNE & SCHWAB, ABC CO, XYZ CORP.
Defendant.

INDEX NO. 156456/2021

MOTION DATE 11/30/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21

were read on this motion to/for

DISMISSAL

Oral argument took place on May 26, 2022 with Michael Feinstein appearing on behalf of Chrysler East Building, L.L.C. (“Landlord”) and Matthew Livits appearing on behalf of Abelman Frayne & Schwab (“Tenant”). Upon the foregoing documents, it is decided and ordered as follows.

I. Factual and Procedural Background

Landlord owns the building located at 666 Third Avenue, New York, NY (the “Building”) (NYSCEF Doc. 1 at ¶ 1). Pursuant to a lease executed August 6, 2014, Tenant leased the entire tenth floor and a portion of the basement (the “Premises”) of the Building for a term expiring May 31, 2026 to operate a law firm (the “Lease”) (*id.* at ¶ 7; NYSCEF Doc. 6). Landlord alleges that Tenant defaulted by failing to pay rent from January 31, 2021 through March 8, 2021 leading to arrears exclusive of interest due in the amount of \$437,918.05 (NYSCEF Doc. 1 at ¶ 10). Landlord sent Tenant a Notice to Cure dated March 12, 2021, which required payment of the default in full by April 2, 2021 (*id.* at ¶ 11). Tenant allegedly failed to cure their default and Landlord then served on Tenant a Termination Notice dated April 27, 2021 terminating the Lease and demanding Tenant deliver possession of the Premises to Landlord by May 10, 2021 (the

“Termination Date”) (*id.* at ¶¶ 12-13). Tenant failed to deliver the premises but allegedly tendered a payment of \$209,885.87 on May 28, 2021, which Landlord and Tenant allegedly agreed would be accepted without prejudice to all of Landlord’s rights and remedies. (*id.* at ¶¶ 14-15). Landlord alleges there have been no other payments for either rent or use and occupancy to date (*id.*).

Around the time of Tenant’s default, Governor Cuomo signed into law the *COVID-19 Emergency Protect Our Small Businesses Act of 2021* (“EPOSBA”), which became effective March 9, 2021 (Chapter 73 of the Laws of 2021). EPOSBA prohibited the initiation of any eviction or ejection proceeding against a commercial tenant until May 1, 2021, which was extended to August 31, 2021 by amendment dated May 4, 2021 (Chapter 104 of the Laws of 2021) and extended again to January 15, 2022 by amendment dated September 2, 2021 (Chapter 417 of the Laws of 2021). The EPOSBA moratorium imposed ended January 15, 2022.

Landlord filed a Complaint against Tenant initiating this action on July 8, 2021 (NYSCEF Doc. 1). Landlord seeks (1) declaratory judgment that the Lease’s term was terminated by the Termination Notice on the Termination Date pursuant to the terms of the Lease; (2) money judgment for rent due through the Termination Date, holdover use and occupancy following the Termination Date until Landlord recovers possession of the Premises (the “Possession Date”), and deficiencies between the rent expected through the duration of the expected Term and the net amount, if any, of rents collected under any reletting of the Premises; and (3) attorneys’ fees (*id.*).

On November 5, 2021 Tenant filed this pre-Answer motion to dismiss arguing (1) the Complaint should be dismissed because it does not comply with EPOSBA; (2) pursuant to a hardship declaration the Court should stay this matter, and (3) pursuant to CPLR § 325(d) this matter should be removed to Housing Part of Civil Court (NYSCEF Doc. 4).

Landlord in turn argues that EPOSBA does not apply because EPOSBA only prohibits eviction proceedings while Landlord is seeking a declaratory judgment and a money judgment. The Landlord is not seeking ejectment (NYSCEF Doc. 20). Moreover, Landlord argues that this matter is inappropriate for Housing Part since Housing Part does not retain jurisdiction over matters seeking declaratory judgment, nor does Housing Part retain jurisdiction over actions seeking money damages in excess of \$25,000 if the action is not an eviction proceeding (*id.* at ¶¶ 34-35).

II. Discussion

A. Motion to Dismiss Standard

As recently reiterated by the Court of Appeals, when reviewing a pre-Answer motion to dismiss for failure to state a claim, the Court must give the pleadings a liberal construction, give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings, and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). A court may also consider affidavits submitted by a plaintiff to remedy any defects in the complaint, because the question is whether plaintiffs have a cause of action, not whether they have properly labeled or artfully stated one (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52 [2016]).

B. EPOSBA's Eviction Proceeding Moratorium

EPOSBA prohibited the commencement of new eviction proceedings where a tenant delivered a hardship declaration (Chapters 73, 104, 417 of the Laws of 2021). Part A, Section 1(1) of EPOSBA defines "eviction proceeding" to mean "a summary proceeding to recover possession of real property under article seven of the real property actions and proceedings law relating to a commercial unit or any other judicial or administrative proceeding to recover possession of real property relating to a commercial unit."

Tenant argues that since Landlord is seeking a declaratory judgment that the Lease's term expired, this action is a *de facto* proceeding to recover possession of commercial real property. In particular, Tenant asserts that granting Landlord the declaratory judgment it seeks would allow Landlord to use "self-help" to effect an eviction by locking Tenant out of the premises pursuant to Section 15.2(a)(i) of the Lease. While Section 15.2(a)(i) of the Lease does allow Landlord to use force to repossess the Premises in the event of Tenant's default, the Lease explicitly limits Landlord's self-help remedy by stating force may be used only "to the extent provided by law" (NYSCEF Doc. 10). EPOSBA barred Landlord's from utilizing "self-help" to regain possession since the act stated "[n]o commercial tenant shall be removed from possession...except by an eviction proceeding." Therefore, Tenant's interpretation of Section 15.2(a)(i) of the Lease is misplaced, since the Lease only allows force to be used to the extent provided by law, and at the time Landlord filed its Complaint, the use of force to recover possession was expressly prohibited.

Moreover, construing Landlord's Complaint so as to give Landlord the benefit of every favorable inference, this Court finds this is not an eviction action, as nowhere does Landlord request the Court to order Tenant to be ejected from the Premises. Rather, this is an action for money damages and for declaratory judgment stating that the Lease Term has expired. While EPOSBA prohibited commercial evictions, it did not prohibit landlords from commencing actions seeking money judgments for tenants' failure to pay rent or use and occupancy. Therefore, the Court finds EPOSBA's protection for commercial tenants does not warrant dismissal of Landlord's Complaint. Because this is not an eviction proceeding, Tenant's subsequent arguments regarding Tenant's hardship declaration under EPOSBA inapplicable.

Similarly, the Court declines Tenant's request to dismiss Landlord's first cause of action for Declaratory Judgment. Although Tenant argues that allowing Landlord's Complaint to proceed "would create a precedent that the evictions protections afforded to commercial tenants under [EPOSBA] can be simply sidestepped" this argument is without merit. Landlord can request declaratory judgment that the

Lease's term was terminated in order to invoke the Lease's liquidated damages provision to recoup money damages and still not seek Tenant's eviction from the Premises. Moreover, the Lease only allows "self-help" to be utilized to the extent permitted by law; therefore, to the extent commercial tenants can only be evicted by eviction proceedings, Landlord was unable to use self-help to evict Tenant. The protections afforded commercial tenants by EPOSBA is a protection from eviction actions; however, EPOSBA does not make tenants immune from landlords who seek money damages due to a tenant's breach of a lease.

C. Removal to Housing Part

The Court also denies Tenant's request that this matter be removed to Housing Part. Civil Court does not have authority to grant the equitable relief sought by Landlord, namely a declaratory judgment; therefore, it would be inappropriate for this Court to remove this case to Housing Part (*Faith in Action Deliverance E Ministries v 3231 Associates, LLC*, 168 AD3d 502, 502-503 [1st Dept 2019]; *Simens v Darwish*, 105 AD3d 686 [1st Dept 2013]). Moreover, since this is not an eviction proceeding and Landlord seeks money damages in excess of \$25,000, Civil Court does not have jurisdiction over this action.

Accordingly, it is hereby,

ORDERED, that Tenant's motion to dismiss is denied in its entirety.

This constitutes the decision and order of the Court.

8/9/2022
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