284 Prospect Park W. LLC v 92 Fitness Crew NY5, LLC
2022 NY Slip Op 32922(U)
August 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 503966/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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284 PROSPECT PARK WEST LLC,

Plaintiff, Decision and order

- against - Index No. 503966/21

92 FITNESS CREW NY5, LLC, LARS O. SCOFIELD, CHARLES JESSE MEDRANO, AND MELISSA BOTT MEDRANO,

Defendants, August 25, 2022

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PRESENT: HON. LEON RUCHELSMAN

The Plaintiff has moved pursuant to CPLR §3212 seeking summary judgment on its first cause of action for breach of the lease on the grounds the tenant breached the lease and for dismissal of the defendant's counterclaims. The defendant opposes the motion, arguing that there are questions of material fact as to whether the defendant repudiated the lease, that the plaintiff violated the lease by misrepresentation, and that its counterclaims ought not to be dismissed. After papers were submitted by the parties and arguments were held, the court now makes the following determination.

The plaintiff, 284 Prospect Park West LLC, is the landlord of a retail space located at 284 Prospect Park West in Kings County. On or about December 28, 2018, 92 Fitness Crew NY5 LLC entered into a lease with the plaintiff. The tenant intended to operate a fitness center at the location, and, as a condition precedent to the lease, the defendants Lars Scofield and Charles and Melissa Medrano executed a guaranty guaranteeing the timely

payment of all rents due (see, Guaranty of Lease Agreement ¶B(1)). Pursuant to a rider to the lease, the lease commencement date was "the date that the Landlord shall deliver possession of the Leased Premises to the Tenant with Landlord's Work . . . substantially completed" (see, Rider to Lease, ¶(b)). Thus the landlord was required to perform certain work on the premises before delivering possession. The landlord was afforded nine months to substantially finish the work. Delays ensued, and the premises were not delivered on time. Defendant and plaintiff were in contact regarding landlord's failure to meet deadlines. On October 9, 2020, defendants provided email notice to plaintiff saying, "we are notifying you of our intention to have the lease rescinded" (Exhibit I, NYSCEF Doc No 23). Plaintiff rejected the request, instituted this action, and asserted causes of action against the tenant and guarantors, alleging they breached the lease and the guaranty and they owe the landlord five years of rent. The landlord also seeks expenses pursuant to the lease. The tenant answered and asserted counterclaims that the plaintiff failed to complete the work within nine months, as outlined in the lease and for a declaratory judgment. The defendant also asserts the plaintiff breached the lease, breached a duty of good faith and fair dealing, and committed fraud in misrepresenting the progress of the work.

The plaintiff now moves seeking summary judgment, arguing

that the defendant repudiated the Lease in the October 9, 2020, email. The plaintiff also seeks dismissal of the defendant's counterclaims, arguing that the defendant's breach precludes a claim that the plaintiff breached. The defendant opposes the motion, arguing that the plaintiff breached the lease first by refusing to perform and by misrepresentation, and that there are questions of fact surrounding the email and other communications between the parties that foreclose a summary determination.

Conclusions of Law

Where the material facts at issue 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, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

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 (Alliance National Insurance Company v. Absolut Facilities Management, LLC, 140 AD3d 810, 31 NYS3d 896 [2d Dept., 2016)]).

Paragraph 77 of the lease rider provides two distinct events that comprise defaults on the part of the landlord. The first is where the landlord fails "to do, observe, keep and perform any of the terms, covenants, conditions, agreements or provisions of this lease required to be done" (Lease Rider, ¶ 77(a)). However, before any default can be found under this provision the tenant must provide written notice of the default and afford the landlord thirty days to cure the problem. If the nature of the obligation requires more than thirty days to cure then commencement of performance and due diligence will suffice. Second, any material misrepresentation by the landlord is an event of default. If the landlord defaults, either by failing to cure a notice duly served by the tenant or by any material misrepresentation then the tenant may terminate the lease without providing further notice.

There are significant questions of fact whether the email sent on October 9, 2020 was an intention to rescind the lease or a notice to the landlord to cure its default. The email states that "I'm just following up on our conversation from Wednesday. As we discussed, it was [sic] been 23 months since we signed the lease for South Slope. Per our discussions and per the lease, this was supposed to be delivered to us 9 months after we signed the lease. To date, work specific to our space has still not commenced. My best estimate is that you still have another 6

months to get to completion if you include the obtaining of all the finals that are required. This has caused many damages for us and this is no longer an acceptable option for us. Therefore, we are notifying you of our intention to have lease rescinded" (see, E-mail from Charles Medrano sent 5:09 PM on October 9, 2020 [NYSCEF DOC. #23]). Thus, while the email does not explicitly offer the landlord an opportunity to cure, it is far from an equivocal termination of the lease. The language contained in the email reciting the history of delay, perhaps, was intended to serve as an impetus for the landlord to complete the work. Moreover, the email did not say the lease is being terminated but rather then tenant intends to rescind the lease. Thus, the precise nature of the email cannot be summarily decided and consequently, further discovery is necessary to determine whether the email was a rescission or a notice. It should also be noted that paragraph 27 of the Lease requires service of all notices in person, by mail, or by courier (see, Lease, ¶ 27 [NYSCEF DOC. #7]).

In any event, there are significant questions of fact whether the plaintiff materially misrepresented the pace of construction and whether construction even significantly commenced by the time the email was sent. If true, then the landlord breached the lease before the tenant. Thus, on June 19, 2018 the plaintiff emailed the defendant informing them that "we

expect to get started with the demo in the next few weeks" (see, E-mail from Kevin Gershenson sent 3:21 PM on June 19, 2018 [NYSCEF Doc. #89]). On August 5, 2018 another email was sent indicating that "we expecting to start the demo this coming week" (see, E-mail from Kevin Gershenson sent 10:52 AM on August 5, 2018 [NYSCEF Doc. #90]). However, permits were not issued by the Department of Buildings until October 2019 as a result of structural concerns arising that summer. Indeed, according to Mr. Gershenson, "although DOB approved the Landlord's initial plans in or about June 2019, permits did not issue until October 2019 due to structural concerns that became evident in the Summer of 2019" (Affirmation of Kevin Gershenson, ¶ 13, dated February 2022 [NYSCEF Doc. #62]). There is no evidence the plaintiff ever disclosed the delay they were aware existed during the summer of 2019. Therefore, there are questions of material fact whether the plaintiff knowingly misrepresented the progress of the work, thereby breaching ¶ 77(b) of the lease rider. Moreover, the plaintiff's alleged misrepresentation purportedly violates Paragraph ¶ 77(b), thus the lack of a notice to cure would not preclude finding plaintiff in breach.

The landlord argues that "it is undisputed that the Plaintiff commenced its performance of the Lease by commencing "Landlord's Work" prior to October 9, 2020" (see, Memorandum in Reply, page 2). However, there is really no evidence to support

that contention. The landlord points to it's own statements in support. However, the affirmation of Mr. Gershenson essentially admits that no work had been performed at all. The landlord argues the tenant had no authority to breach without affording the landlord an opportunity to cure (Lease Rider ¶ 77(a)). That is certainly true concerning defaults. However, the tenant has presented evidence of other defaults, namely the landlord's material misrepresentation of the commencement and pace of construction. That breach, if true, required no prior notice to the landlord (Lease Rider ¶ 77(b)). Therefore, there are questions of fact whether the landlord breached the lease prior to the tenant's email. Thus, all motions seeking summary judgement are denied.

So ordered.

ENTER:

DATED: August 25, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC