255 ADC Realty Corp. v Popular Jewelry Corp.
2022 NY Slip Op 33243(U)
September 20, 2022
Supreme Court, New York County
Docket Number: Index No. 651440/2019
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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255 ADC REALTY CORP.,

Plaintiff

Index No. 651440/2019

- against -

DECISION AND ORDER

POPULAR JEWELRY CORP. a/k/a POPULAR JEWELRY INC.,

Defendant

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendant entered a written sublease, dated October 1, 2010, for use of plaintiff's premises at 255B Canal Street, New York County, until September 30, 2018. The sublease required defendant's work on the premises to "comply with all laws, orders, rules and regulations of all government authorities having jurisdiction of the Premises." Aff. of Konstantinos G. Baltzis in Opp'n Ex. B § 44(C)(a). On January 15, 2011, the New York City Department of Buildings (DOB) issued a Notice of Violation to plaintiff, after defendant installed signs on the building's facade without a DOB permit. Plaintiff cured the violation March 1, 2011, and paid a $4,000.00 fine March 18, 2011.

Over seven years later, December 21, 2018, plaintiff mailed a demand letter to defendant for costs incurred from the DOB

violation. Plaintiff commenced this action March 11, 2019, to recover damages for defendant's alleged breach of the sublease, indemnification, and attorneys' fees.

II. DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT

Defendant moves to dismiss the verified complaint because plaintiff did not commence this action within six years of defendant's alleged breach of the sublease. C.P.L.R. §§ 213(2), 3211(a)(5).

A. Extending the Statute of Limitations to the End of the Sublease

Plaintiff contends that defendant breached the sublease when DOB issued the Notice of Violation January 15, 2011, but asks that the statute of limitations be extended to September 30, 2018, because defendant failed to surrender the premises pursuant to the sublease. Section 21 of the sublease provides:

> Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, "broom-clean," in good order and condition, ordinary wear excepted, and Tenant shall remove all its property. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease.

Baltzis Aff. in Opp'n Ex. B § 21. Yet the verified complaint contains no allegations regarding a violation of this section of the sublease. Plaintiff's breach of contract claim, even liberally construed, plainly arises from defendant's alleged noncompliance with DOB's code requirements, not from defendant's failure to surrender the premises "'broom-clean,' in good order

and condition." Id. Thus plaintiff may not rely on this sublease section to sustain plaintiff's breach of contract claim.

Moreover, plaintiff acknowledges that defendant renewed the sublease June 27, 2018, directly with the overlandlord, which terminated plaintiff's interest in the premises. Thus defendant owed no obligation to surrender the premises to plaintiff by September 30, 2018, and, as plaintiff acknowledges, did not in fact surrender so as to trigger an obligation to leave the premises "'broom-clean,' in good order and condition." Id.

B. Continuing Wrongs

Plaintiff also contends that the continuing wrongs doctrine tolled the statutes of limitation until defendant's last breach occurred, but the verified complaint lacks any allegation that defendant breached a "recurring duty." Henry v. Bank of Am., 147 A.D.3d 599, 602 (1st Dep't 2017). Rather, the complaint alleges three claims, each of which arises from the same DOB violation issued January 15, 2011. Absent any allegation of continuing unlawful conduct, the continuing wrongs doctrine is inapplicable. New York Yacht Club v. Lehodey, 171 A.D.3d 487, 487 (1st Dep't 2019); Gibbons v. Grondahl, 161 A.D.3d 590, 590 (1st Dep't 2018); Henry v. Bank of Am., 147 A.D.3d at 602.

The court does not consider the affidavit of Sit Kwan Cheung, plaintiff's president, to the extent that he attests to other breaches of the sublease, since the complaint does not

allege these claims. Because the complaint refers solely to the DOB violation issued January 15, 2011, without additional allegations of a continuing wrong, the statute of limitations for defendant's alleged breach of the sublease runs from that date, which is over six years before plaintiff commenced this action in 2019. C.P.L.R. § 213(2); Acquafredda Enterprises LLC v. Sterling Natl. Bank, 202 A.D.3d 501, 502 (1st Dep't 2022); Spada v. Aspen Univ., Inc., 202 A.D.3d 494, 494 (1st Dep't 2022).

Even were the court to consider Cheung's attestations, none of defendant's alleged conduct would extend the statute of limitations for the breach of contract claim. Cheung alleges that defendant caused a fire in 2014, but the statute of limitations for property damage is three years. C.P.L.R. § 214(4); Americon Constr., Inc. v. Cirocco & Ozzimo, Inc., 205 A.D.3d 568, 569 (1st Dep't 2022); Ubiles v. Ngardingabe, 194 A.D.3d 436, 436 (1st Dep't 2021); Troy-McKoy v. Mount Sinai Beth Israel, 182 A.D.3d 524, 525 (1st Dep't 2020); Verizon New York Inc. v. Consolidated Edison, Inc., 127 A.D.3d 621, 622 (1st Dep't 2015).

Cheung's further allegation of a 2019 DOB violation is not actionable under the sublease, since the allegation falls outside the term of the sublease between plaintiff and defendant, and could not have caused plaintiff damages when it no longer held any interest in the cited premises. To the extent the violation

indicates a recurring signage condition similar to the 2011 violation, since plaintiff alleges it cured the prior violation, the new violation does not suggest a continuous wrong by defendant, but instead suggests that plaintiff's cure was faulty.

C. Costs to Cure the 2011 Violation

Plaintiff's remaining claims also have expired. The statute of limitations applicable to plaintiff's claim for indemnification of the $4,000.00 fine that plaintiff paid to DOB runs from March 18, 2011. Tedesco v. A.P. Green Indus., Inc., 8 N.Y.3d 243, 247 (2007); Residential Bd. of Managers of Platinum v. 46th St. Dev., LLC, 154 A.D.3d 422, 423 (1st Dep't 2017); Varo, Inc. v. Alvis PLC, 261 A.D.2d 262, 265 (1st Dep't 1999). Plaintiff alleges that it incurred other costs to cure the violation, besides the $4,000.00 fine, totaling $31,415.08, for which plaintiff claims indemnification, but the complaint does not specify these alleged costs, nor the dates plaintiff incurred them. Baltzis Aff. in Opp'n Ex. I ¶¶ 15, 27, 29, 30, 36, 40.

As evidence of costs to cure the violation incurred after March 2011, plaintiff points to a Certificate of No Effect from the New York City Landmarks Preservation Commission, which again the complaint nowhere mentions, and which is unauthenticated and without any foundation for its admissibility as evidence supplementing the complaint. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Cron v. Hargro Fabrics, 91 N.Y.2d 362,

366 (1998); US Suite LLC v. Barata, Baratta & Aidala LLP, 171 A.D.3d 551, 551 (1st Dep't 2019); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013). Again, even were the court to consider this unsworn hearsay document, it merely dictates that the installation of signage for defendant's jewelry store will be on the awning only, will not affect architectural features, and "will be in keeping with signage found on buildings of this type and period." Baltzis Aff. in Opp'n Ex. E, at 2. It indicates neither the signage condition that DOB cited as a violation, nor any correction or absence of correction of that condition. Finally, even if this document did indicate a continuing cure of the 2011 violation, the evidence is from 2012, still outside the limitations period of six years before plaintiff commenced this action. C.P.L.R. § 213(2).

The definitive allegations and evidence presented by plaintiff here demonstrate that any costs incurred to cure the violation necessarily accrued before March 1, 2011, when DOB issued a Certificate of Correction declaring the violation cured, which plaintiff itself presents as evidence of the violation and its correction. As plaintiff further acknowledges, neither the complaint nor Cheung alleges that this Certificate of Correction was false or that DOB rejected it. Therefore the statute of limitations applicable to plaintiff's claim for indemnification of any costs related to curing the violation runs, at the very

latest, from March 1, 2011, Tedesco v. A.P. Green Indus., Inc., 8 N.Y.3d at 247; Residential Bd. of Managers of Platinum v. 46th St. Dev., LLC, 154 A.D.3d at 423; Varo, Inc. v. Alvis PLC, 261 A.D.2d at 265, again over six years before plaintiff commenced this action. C.P.L.R. § 213(2). Consequently, none of plaintiff's claims survives. C.P.L.R. § 3211(a)(5).

III. CONCLUSION

For the reasons explained above, the court grants plaintiff's motion to dismiss the verified complaint as untimely. C.P.L.R. §§ 213(2), 3211(a)(5). If plaintiff claims it still was incurring costs related to curing the 2011 violation through 2018, which the record in this action does not reveal, plaintiff is still within the statute of limitations to commence a new action setting forth those facts that plaintiff nowhere shows here.

DATED: September 20, 2022

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C