Sanli Oriental Rugs Corp. v S&S Realty Corp
2022 NY Slip Op 33537(U)
October 11, 2022
Supreme Court, New York County
Docket Number: Index No. 157787/2018
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M
Justice

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SANLI ORIENTAL RUGS CORPORATION,

Plaintiff,

- v -

S&S REALTY CORP., PARAMOUNT REALTY MANAGEMENT INC.

Defendants.

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INDEX NO. 157787/2018

MOTION DATE 07/20/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISSAL.

Plaintiff, Sanli Oriental Rugs Corp. (plaintiff or tenant), commenced this action against defendant landlord, S&S Realty Corp. (S & S), and defendant management company, Paramount Realty Management, Inc. (Paramount) (collectively, defendants or landlord), stemming from damages allegedly caused by a water leak in the commercial premises located at 47-61 Pearson Place, Queens, New York (the premises). Defendants now move pursuant to CPLR 3212 for summary dismissal of the complaint. The motion is opposed. For the following reasons, defendants' motion is denied.

BACKGROUND

Plaintiff entered into a five-year commercial lease agreement with defendants for the storage of carpets and rugs. The lease ran from April 1, 2015, through March 31, 2020. The lease rider contained a provision stating that the landlord is liable for its own negligence. Section 52 of the rider states:

> Except as provided herein, Landlord shall not be held liable, *unless caused by Landlord's negligence*, for any injury to or death of any person or persons or injury or damage to merchandise, goods, furniture, fixtures or other property, from theft or accident, or from steam, gas, electricity, water, rain which may seep into, issue or flow from the Building, *unless same shall be due to Landlord's negligence or reckless or intentional conduct*.

(NYSCEF doc. no. 37 at pp 20 [emphasis added]).

The lease rider also contained a provision requiring that the tenant obtain general liability insurance for the premises that covered bodily injury, death, or property damage and named the

landlord and its agents as additional insureds. It is undisputed that plaintiff did not have insurance on the leased premises.

Plaintiff alleges that due to the defendants' negligence, on September 6, 2017, water leaked into the leased premises causing over $120,000 damage to rugs that were being stored there. Plaintiff contends that it notified the landlord on at least three occasions about the water leak, but the landlord failed to make any repairs. The building manager testified that it went to plaintiff's suite after the leak was reported and saw a bucket with some water in it and a stain on the ceiling, but it could not determine what caused the stain, whether the stain was an old stain, or where the water in the bucket had come from, and did not observe damage to the rugs. Defendants motion does not address any factual issues concerning whether they acted negligently or whether it caused the damage to defendant's rugs. Nor does it refute in its reply the facts asserted in plaintiff's opposition. Rather, the defendants' sole basis for their request for summary dismissal is that they are not liable for any damages because plaintiff failed to obtain insurance in breach of the terms of the lease and rider.

In support of its motion, defendants argue that plaintiff's suit is barred because plaintiff failed to obtain insurance as required by the lease agreement and rider. Plaintiff opposes the motion, arguing that defendants' motion is procedurally defective because it does not include a statement of material facts as required by 22 NYCRR 202.8-g(a), that the lease agreement is inadmissible because defendants failed to include a sworn affidavit from a person with personal knowledge of the document, and that the insurance procurement provision of the lease is ambiguous, does not demonstrate mutual assent of the parties that the landlord would not be liable for negligence, and violates General Obligations Law § 5-321.

22 NYCRR 202.8-g

In February 2021, section 202.8-g was added to the Uniform Rules of the Supreme and County Courts, which required that every motion for summary judgment include a "short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried." Although that provision was subsequently amended to state that the court *may* direct that the statement be annexed, and to add a subdivision that gives courts the discretion to fashion a remedy where a party does not provide a statement, those amendments did not become effective until July 1, 2022, which was after defendants filed their motion and after plaintiff submitted opposition papers.

Defendants' moving papers does not contain a statement of undisputed facts. Defendants assert that the affirmation they filed in support of the motion was improperly labeled and was intended to be defendants' statement of undisputed facts and asks this Court to deem the filing as such (NYSCEF doc. no. 40 ¶ 6). As there is no indication that if directed to refile a statement of undisputed facts in accordance with section 202.8-g the defendants would submit a materially different filing than what is already before the Court, and there is no prejudice to plaintiff who has submitted a counterstatement of undisputed facts in an exercise of discretion pursuant to CPLR 2101(f), and in the interest of judicial economy, the Court will decide this motion based on the submissions currently before it (*see Disarli v Tefaf New York, LLC*, 2022 NY Slip Op 30029[U], *2-3 [Sup Ct, Kings County 2022] [exercising discretion to consider summary judgment motion

although movant failed to submit a statement of undisputed facts where the attorney affirmation contained numbered factual statements and there was no prejudice as plaintiff was able to submit a counterstatement of material facts in opposition]).

CPLR 3212

On a motion for summary judgment, the movant carries the initial burden of tendering admissible evidence sufficient to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant meets its initial burden, the burden shifts to the opposing party to "show facts sufficient to require a trial of any issue of fact" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff's argument that the insurance procurement provision violates General Obligations Law § 5-321 and was not the product of mutual assent by the parties are without merit (*see Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 160-161 [1977] [commercial lease requiring tenant to maintain liability insurance for landlord's benefit represents a risk allocation agreement among sophisticated parties that is not violative of General Obligations Law § 5-321]; *Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001] [lease provisions requiring that a tenant to procure insurance and name the landlord as an additional insured are generally valid and enforceable]). Further, the lease and rider do not violate General Obligations Law § 5-321 because the landlord is not absolved of liability for its own negligence pursuant to section 52 of the rider.

Defendants, however, have not raised a counterclaim asserting breach of contract—they only raised it in their answer as a defense to plaintiff's negligence claim (NYSCEF doc. no. 2). A breach of the insurance procurement provision of the lease does not, as defendants contend, bar plaintiff from bringing action against defendants for negligence nor does it entitle defendants to summary judgment dismissing plaintiff's claim. The failure to obtain insurance may limit the amount of damages, if any, that plaintiff can recover should he prevail in this matter (*see Inchaustegui*, 96 NY2d at 114-115 [landlord who suffers damage as a result of tenant's failure to obtain insurance may recover from plaintiff for liability, but amount is limited to out-of-pocket costs where landlord had insurance]), but it does not resolve the factual issues of whether defendants breached their duty of care and caused damage to plaintiff's property. Breach of contract and liability for negligence are two distinct determinations (*see generally Spector v Cushman & Wakefield, Inc.*, 100 AD3d 575, 575 [1st Dept 2012] ["a final determination of liability for the failure to procure insurance need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries"] [internal quotations omitted]; *Bleich v Metropolitan Management, LLC*, 132 AD3d 933 [2d Dept 2015] [triable issues of fact precluded summary judgment on issue of landlord's negligence, but court granted summary judgment on breach of insurance clause]; *Yofi Book Publishing, Inc. v Wil-Brook Realty Corp.*, 287 AD2d 712 [2d Dept 2001] [although defendant was entitlement to summary judgment on breach of contract counterclaim for tenant's failure to obtain insurance, plaintiff was entitled to summary judgment on issue of liability for defendant's negligence]; *Doyle v B3 Deli, Inc.*, 224 AD2d 478 [2d Dept

2001] [deciding summary judgment motion on liability claim separately from motion for breach of contract for failure to procure insurance]). As defendants have only presented admissible evidence establishing breach of the lease in their moving papers and there are still material issues of fact as to whether there was a water leak, where the water came from, whether defendants had notice of the leak, and whether the damage to plaintiff's rugs were caused by the leak, defendants are not entitled to summary judgment dismissing plaintiff's claim of negligence.

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3212 for summary dismissal of the complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants, with notice of entry, within ten (10) days of entry.

This constitutes the Decision and order of the Court.

10/11/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
APPLICATION:	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE