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| Gotham Real Estate Devs., LLC v 432 Park S. Realty Co LLC |
| 2022 NY Slip Op 34407(U) |
| December 22, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 653493/2021 |
| Judge: Arthur F. Engoron |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

-----X

GOTHAM REAL ESTATE DEVELOPERS, LLC,

Plaintiff,

- v -

432 PARK SOUTH REALTY CO LLC, A. RODRIGUEZ
CONSTRUCTION LLC,

Defendants.

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INDEX NO. 653493/2021

MOTION DATE 11/10/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 79, 81, 82, 83, 84, 85, 86, 87, 89, 92, 93

were read on this motion to DISMISS

Upon the forgoing documents, and for the reasons stated hereinbelow, defendant's motion to dismiss plaintiff's Amended Verified Complaint is granted.

Background

On June 29, 2015, plaintiff, Gotham Real Estate Developers LLC ("Tenant"), as tenant, entered into a lease (the "Lease") with defendant, 432 Park South Realty Co LLC ("Landlord"), as landlord, for the entire second floor of a terra cotta-clad commercial office building located at 432 Park Avenue South, New York, New York (the "Premises"). NYSCEF Doc. No. 71. The Lease commenced July 1, 2015, and, after a modification and extension signed in November of 2019, is set to terminate December 31, 2026. Id.

Paragraph 4 of the Lease, titled "Repairs," states in relevant part that "Tenant shall give [Landlord] prompt notice of any defective condition in any plumbing, heating ... and following such notice, [Landlord] shall remedy the condition with due diligence ... Except as specifically provided ... there shall be no allowance to Tenant for the diminution of rental value and no liability on the part of the [Landlord] by reason of inconvenience, annoyance or injury ... arising from ... failing to make repairs." Id.

Paragraph 31 of the Lease, titled "Elevators, Heat, Cleaning," says, in pertinent part, that Landlord shall "furnish heat, water, and other services" during business days, and "clean the public halls and public portions of the building which are used in common by all tenants." Id.

Paragraph 43.04 of the Lease, titled "No Abatement," provides that "Tenant shall not be released or excused from the performance of any of its obligations under this Lease for any failure or for interruption or curtailment of any electric energy, elevator service, heat, or for any reason

whatsoever, and no such failure, interruption or curtailment shall constitute a constructive or partial eviction.” Id.

Paragraph 46.02 of the Lease, titled “Notice of Default,” states that “Landlord shall not be in default under this Lease in any respect unless the Tenant shall have given the Landlord written notice of the breach in accordance with the terms of this Lease, and within thirty (30) days after notice, the Landlord has not cured the breach or if the breach is such that it cannot reasonably be cured under the circumstances within thirty (30) days, has not commenced diligently to prosecute the cure to completion.” Id.

On September 8, 2020, Tenant sent a written “Notice of Lease Default” alerting Landlord that ongoing repairs to the Premises’ façade had created unsafe conditions and a nuisance that was interfering with Tenant’s access and use. NYSCEF Doc. No. 74.

On November 4, 2020, Landlord commenced a nonpayment action against Tenant, to which Tenant answered with denials, 13 affirmative defenses, and counterclaims of breach of contract leading to partial constructive eviction, and for failing to maintain properly the Premises’ Heating, Ventilation, and Air Conditioning (“HVAC”) unit. In a Decision and Order dated February 26, 2021, the Court dismissed all of Tenant’s counterclaims and affirmative defenses to the nonpayment action, noting that the former had been contracted out of the Lease. NYSCEF Doc. No. 69. In a Decision and Order dated June 21, 2021, the Court granted summary judgment in that action against Tenant as to liability. NYSCEF Doc. No. 75.

On May 27, 2021, Tenant commenced the instant action against Landlord and Landlord’s now-former contractor, defendant A. Rodriguez Construction LLC (“Contractor”), asserting nine causes of action: (1) breach of lease against Landlord for failure to make building and HVAC repairs; (2) partial constructive eviction against Landlord; (3) nuisance against both defendants; (4) trespass against both defendants; (5) conversion against both defendants; (5) breach of contractual duty to safeguard premises against both defendants; (7) negligence against both defendants; (8) breach of covenant of quiet enjoyment against Landlord; and (9) declaratory relief against Landlord permitting Tenant to terminate its lease, or, in the alternative, granting it a rent abatement and damages. NYSCEF Doc. No. 67.

On July 1, 2021, Landlord moved, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss Tenant’s complaint. In a Decision and Order dated October 29, 2021, this Court granted Landlord’s motion in part and dismissed, without prejudice, all of Tenant’s causes of action except the breach of contract action against Landlord, and only as to the repair and replacement of the Premises’ HVAC. NYSCEF Doc. No. 69.

On April 1, 2022, Tenant filed an Amended Verified Complaint asserting four causes of action: (1) breach of contract against Landlord for “failure to prevent leaks into the premises, failure to provide adequate heat, failure to replace the HVAC and failure to properly maintain the building’s stairwell”; (2) partial constructive eviction against Landlord; (3) nuisance against Landlord and Contractor; and (4) breach of the covenant of quiet enjoyment against Landlord. NYSCEF Doc. No. 59.

On July 19, 2022, Landlord moved, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss Tenant's Amended Verified Complaint. NYSCEF Doc. No. 65.

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Leon v Martinez, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR(a)(5) is warranted when “the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.” And dismissal pursuant to CPLR 3211(a)(7) is warranted when, “afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference,” the complaint fails to assert facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

Breach of Contract Cause of Action

“[E]ven if [an alleged breach] could have supported a claim for breach of the lease, such a claim was precluded by the tenant's failure to comply with lease paragraph 46.02, which required it to send written notice of a claimed default in order to give the landlord the opportunity to cure. Because no such notice was served, the tenant is not entitled to relief based on a claim that the landlord was in default of the lease.” Pac. Coast Silks, LLC v 247 Realty, LLC, 76 AD3d 167, 176 (1st Dept 2010).

In its Amended Verified Complaint, Tenant alleges that Landlord breached the Lease by failing to prevent water leaks, failing to provide adequate heat, failing to maintain properly and keep clean the building's stairwell, and, as in its initial Complaint, failing to reimburse Tenant for a replacement HVAC unit, pursuant to Article 44.12 of the Lease. NYSCEF Doc. No. 59.

Landlord argues in response that Tenant's claims are barred by res judicata as they are related in time, space, and motivation to the same transaction or series of transactions in the causes of action that this Court previously adjudicated in its October 29, 2021, Decision and Order.

Alternatively, Landlord argues that it cannot have defaulted on the Lease unless, pursuant to Paragraph 46.02, Tenant delivered a particularized notice to cure and, here, the only documentary evidence provided of a written notice to cure given by Tenant, NYSCEF Doc. No. 74, was explicitly and only related to the work being done to the exterior of the Premises.

Finally, counsel for Landlord affirms that Tenant, in alleging that Landlord kept the Premises “cold” between November 2021 and March 2022, failed to disclose to the Court that Tenant “has its own controlled HVAC system and furnishes its own heat.” NYSCEF Doc. No. 93. The Court has received a letter from Tenant's counsel addressing this, dated December 5, 2022, which is in the nature of an unauthorized sur-reply and, thus, the Court is inclined not to consider it. However, even if it did consider it, the Court would reach the same result indicated herein.

Tenant's breach of contract cause of action should be dismissed, including, upon closer judicial consideration, that part relating to the replaced HVAC. According to the Amended Verified Complaint, Tenant gave Landlord written notice that it was in breach of the Lease, in accordance with Paragraph 46.02, only once: in a letter dated September 8, 2020, in which it references only issues arising from the repairs to the building's exterior and public portions of the building. As such, pursuant to the terms of the Lease entered into and agreed to by Landlord and Tenant, both sophisticated parties, Landlord cannot be in default for the alleged leaks in 2019, heat problems in 2021-22, or a "grimy" stairwell in 2022, absent a written notice to cure.

What is more, the series of emails submitted by Tenant as evidence of Landlord breaching the Lease, NYSCEF Doc. No. 86, instead appears to show that, upon being informed of a broken water pipe on January 14, 2019, a leaking radiator on January 23, 2019, and a leak in a bathroom hallway on March 2, 2020, Landlord's agents took efforts to "remedy the condition with due diligence," as required by Paragraph 4 of the Lease.

Partial Constructive Eviction

"[C]onstructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises." Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 83 (1970).

In its initial Complaint, Tenant alleged it suffered partial constructive eviction by Landlord and Contractor based on the legally mandated façade work undertaken by them. In its Decision and Order of October 29, 2021, this Court dismissed that cause of action against the Landlord, as the work was required by law and for public safety, and Contractor, as the alleged offending actions of its workers (bottling urine, standing around idly, sleeping) were outside the scope of employment and not in the pursuit of the interests of either defendant.

Now, in its Amended Verified Complaint, Tenant demands a rent abatement or damages based on an alleged partial constructive eviction caused by the same "improper conduct" by Landlord and Contractor, as well as based on Landlords' alleged failure to provide heat or maintain the building such that Tenant "is unable to use and enjoy the entire Premises."

Tenant's new partial constructive eviction cause of action should be dismissed. The partial constructive eviction claim based on construction work is clearly precluded by res judicata and, further, given every possible favorable inference, Tenant has not shown that wrongful acts of Landlord, in not providing enough heat, substantially and materially deprived Tenant of the use of the Premises. To the contrary, Tenant, in the affidavit of its Chief Operating Officer, Phil Lavoie, acknowledges that when given notice (by telephone) of the Premises being cold, Landlord's Superintendent made efforts to rectify the situation and, further, Tenant did not abandon, or even partially abandon, the Premises but instead continued to use and occupy it, with "numerous space heaters." NYSCEF Doc. No. 81.

Nuisance

“Nuisance imports a continuous invasion of rights – ‘a pattern of continuity or recurrence of objectionable conduct.’” Domen Holding Co. v Aranovich, 1 NY3d 117, 124 (2003) (quotations and citations omitted).

Despite Tenant’s effort to “tailor” its Amended Verified Complaint “to cure defects noted by the Court,” the new cause of action alleging nuisance by Landlord and Contractor is barred by res judicata.

Although in its Amended Verified Complaint Tenant has added the word ‘continuous’ and a claim that defendants were given repeated demands to stop the alleged harmful conduct to its cause of action, there is nothing in the pleadings to show that the Tenant’s allegations of construction workers behaving badly at individual times, occasional leaks occurring, or even of inadequate winter heat, was “constant,” as alleged in the complaint, let alone rose to the level of a “pattern of continuity or recurrence of objectionable conduct” sufficient to sustain a private nuisance claim.

Covenant of Quiet Enjoyment

“To prevail on a cause of action for breach of the covenant of quiet enjoyment, a tenant ‘must show an ouster, or if the eviction is constructive ... an abandonment of the premises.’ Reade v Reva Holding Corp., 30 AD3d 229, 237 (1st Dept 2006) (quotation and citation omitted).

Tenant alleges the actions of Landlord and Contractor constitute a breach of Paragraph 23 of the Lease covenanting that Tenant is entitled to a quiet enjoyment of the Premises provided it pays its rent. Tenant pled essentially the same cause of action in its original Complaint, which was dismissed by this Court due to Tenant’s delinquency in paying rent.

Now Tenant, having paid its back rent in September 2021 and made timely rent payments since then, again alleges Landlord has breached the covenant of quiet enjoyment.

Still, Tenant’s new covenant of quiet enjoyment cause of action should be dismissed. With the exception of the issues with the heat and stairwell, all of Landlord’s alleged offenses in the Amended Verified Complaint still occurred before Tenant met its condition of the covenant of quiet enjoyment (paying rent) and are therefore barred by res judicata. And, as Tenant admittedly never abandoned the Premises owing to the alleged heat issues, there is no breach of the covenant of quiet enjoyment. See Herstein Co. v Columbia Pictures Corp., 4 NY2d 117, 121 (1958).

Finally, whether or not Landlord kept the building’s public stairwell clean is irrelevant to the Lease’s covenant of quiet enjoyment, as it only covers the “premises hereby demised,” which the Lease defines as “the entire rentable area of the 2nd floor.” Public stairwells are not rentable.

Conclusion

Therefore, the motion of defendant 432 Park South Realty Co., LLC, to dismiss the Amended Verified Complaint of plaintiff, Gotham Real Estate Developers LLC, is granted, and the Clerk is hereby directed to enter judgment accordingly.



12/22/2022

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE