

Reclaim N.Y., Inc. v Vindex LLC

2023 NY Slip Op 30732(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 156155/2021

Judge: Louis L. Nock

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

RECLAIM NEW YORK, INC.,

Plaintiff,

- v -

VINDEX LLC,

Defendant.

-----X

VINDEX LLC,

Third-Party Plaintiff,

-against-

597 SCRIBNER LLC,

Third-Party Defendant.

-----X

INDEX NO. 156155/2021

MOTION DATE 07/12/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595786/2021

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, and 63

were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion by plaintiff Reclaim New York, Inc. (“Reclaim”), for summary judgment (except as otherwise indicated herein), and so much of the cross-motion of defendant/third-party plaintiff Vindex LLC (“Vindex”) for partial summary judgment on its counterclaims, are denied based on the following memorandum decision. So much of Vindex’s cross-motion seeking summary judgment against third-party defendant 597 Scribner LLC (“Scribner”) is also denied per the following.

Background

Reclaim leased the 11th floor of the building located at 597 Fifth Avenue (the “premises”) from Scribner (main lease, NYSCEF Doc. No. 25). Reclaim then sublet the premises to Vindex on March 11, 2020, shortly before the beginning of the public shutdowns occasioned by the COVID-19 pandemic (sublease, NYSCEF Doc. No. 26). The sublease incorporates by reference the provisions of the main lease (*id.*, ¶ 4 [A]). Relevant to the motion and cross-motion, the sublease provides that:

[T]he supplying of services including, without limitation, heat , light, water, air conditioning and other utilities, janitorial cleaning, window washing and elevator services, and building maintenance and repair are the obligations of [Scribner], and that [Reclaim] has no control thereof, and assumes no responsibility in connection therewith[, and] no failure to furnish . . . any such services or facilities shall give rise to any (a) abatement . . . of [Vindex’s] obligations under this sublease . . . (b) constructive eviction, in whole or in part, or (c) liability on the part of [Reclaim] unless solely caused by or arising out of [Reclaim’s] negligence or willful misconduct.”

(*Id.*)

In the event that Scribner defaulted on its obligations under the lease, Reclaim agreed to “reasonably cooperate with [Vindex] in connection with requests, inquiries and/or demands made by [Vindex] relating to performance by [Scribner] under the Main Lease and by association this Sublease” (*id.*). Of further note: the main lease provides that when the lease terminates, “[Reclaim] shall remove all of its property [Reclaim] agrees that any personal property remaining in the Premises following the expiration of the term of this Lease . . . shall for all purposes be deemed conveyed to and to be the property of [Scribner] who shall be free to dispose of such property, at [Reclaim’s] cost, in any manner [Scribner] deems desirable” (main lease, NYSCEF Doc. No. 25 § 12).

Vindex was delayed by the ongoing pandemic from moving into the premises. In October 2020, Vindex began notifying the building superintendent and Reclaim that its trash was not being picked up, the offices were not being cleaned, and there was no security or door attendant in the lobby (October emails, NYSCEF Doc. No. 51 at 3). After receiving no response from Scribner's managing agent's vice president, Curtis Borgstede (*id.* at 1-2), Vindex wrote a letter to Borgstede detailing the various ways in which Scribner was not abiding by the terms of the lease (October 29, 2020 letter, NYSCEF Doc. No. 52). As of November 3, 2020, Reclaim had also attempted to contact Scribner to rectify the issues but had received no response (November emails, NYSCEF Doc. No. 53 at 5). Vindex followed up with Borgstede via email, adding that the heat and electricity in the space were not functioning, but also received no response (email to Borgstede, NYSCEF Doc. No. 54). Finally, after Scribner failed to remedy the problems, Vindex sent Reclaim a letter on December 21, 2020, detailing Scribner's various breaches of the main lease, declaring that it (Vindex) had been constructively evicted from the premises, and terminating the sublease (Vindex termination letter, NYSCEF Doc. No. 55). Reclaim asserts that Vindex was not constructively evicted and never abandoned the premises, as certain furniture belonging to Vindex remains in the premises. Instead, Reclaim purported to terminate the sublease as of April 15, 2021, following Vindex' failure to pay rent after Vindex' claimed termination of the sublease (notice of termination, NYSCEF Doc. No. 31).

Reclaim commenced the instant action against Vindex, asserting claims for ejectment, recovery of unpaid rent and use and occupancy, costs, and attorneys' fees. Vindex counterclaimed against Reclaim and initiated a third-party action against Scribner, asserting claims for breach of the main lease and sublease, and seeking a declaratory judgment that Vindex had been constructively evicted as of October 19, 2020, as well as a return of the security deposit

from Reclaim. Scribner failed to answer the third-party complaint. Vindex moved for a default judgment against Scribner, and the court granted the motion to the extent of finding that Vindex had established entitlement to default relief but deferring resolution of damages and the issuance of a declaratory judgment pending the resolution of the primary action between Reclaim and Vindex (decision and order, NYSCEF Doc. No. 40).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion

The crux of both the motion and cross-motion is whether conditions in the premises amounted to a constructive eviction of Vindex in violation of the covenant of quiet enjoyment, terminating the sublease and Vindex's obligation to pay rent. "A constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended" (*Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1st Dept 1999]). A tenant must show that "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]). "To demonstrate constructive eviction, then, a tenant must vacate the premises" (*Prakhin v Fulton Towers Realty Corp.*, 122 AD3d 601, 603 [2d Dept 2014]). Further, the tenant must vacate with reasonable promptness (*Joseph P. Day Realty Corp. v Franciscan Sisters for Poor Health Sys., Inc.*, 256 AD2d 134, 135 [1st Dept 1998]).

Reclaim initially relies on language in the main lease purporting to waive the right to claim constructive eviction (main lease § 26 ["No act or omission of landlord or its agents shall constitute an actual or constructive . . . eviction"]), but such language is not enforceable in the face of a breach of the covenant of quiet enjoyment. As the Appellate Division held while addressing a similar provision:

Under the interpretation of paragraph 24 of the lease, as urged by the defendant, a tenant could never claim a breach of the covenant of quiet enjoyment, since no act of the landlord could ever "constitute an eviction." In effect, therefore, a tenant would be compelled to continue paying rent to his landlord notwithstanding the fact that, through the landlord's own acts of omission or commission, the demised premises have been rendered untenable and uninhabitable. Such a construction is not consonant with common sense or with the mutual intent of the parties.

(*Leider v 80 William St. Co.*, 22 AD2d 952, 953 [2d Dept 1964].)

Thus, if the failure to clean, heat, and provide power and security for the premises sufficiently rendered the premises unusable, then Vindex may claim that it was constructively evicted. Factual issues in the documentary evidence submitted by Vindex (*see*, NYSCEF Doc. Nos. 51-55 [communications from and on behalf of Vindex to Reclaim over the course of time complaining about conditions of the premises]) preclude resolution of this question (*Joseph P. Day Realty Corp.*, 256 AD2d at 135 [holding that promptness of tenant vacating and severity of landlord's failure to provide services were issues of fact]). The cases cited by Reclaim for the proposition that the claims were not sufficiently severe, are not to the contrary (*Zevnik, Horton, Guibord, McGovern, Palmer & Fognani, LLP v Sheraton Holding Corp.*, 304 AD2d 455, 455 [1st Dept 2003] [*“one-time interference with the use and enjoyment of premises does not amount to the substantial and material deprivation necessary to establish a constructive eviction”*] [emphasis added]; *3 E. 54th St. New York, LLC v Patriarch Partners, LLC*, 40 Misc 3d 1237[A], 2013 NY Slip Op 51329[U] at *3 [Sup Ct NY County 2013] [tenant failed to allege how premises were rendered unusable “apart from alleging that the garbage removal issue created an ‘uncomfortable working environment’”]).

Reclaim argues that Vindex failed to promptly vacate the premises, barring any claim for constructive eviction, because Vindex left furniture behind in the premises and never returned the keys to Reclaim. As to the furniture, the main lease provides that, in the event of the termination of the lease, any furniture left behind by the tenant becomes the landlord's property (main lease, NYSCEF Doc. No. 25, § 12). This provision applies with equal force to the sublease (sublease, NYSCEF Doc. No. 26, ¶ 4 [a]). Accordingly, assuming, arguendo, that Vindex was constructively evicted, any furniture left behind is now Reclaim's to dispose of as it wishes pursuant to the terms of the main lease and sublease. Regarding the failure to return the

keys, considering the assertions that Vindex vacated the premises and the furniture it abandoned has become Reclaim's by operation of the lease and sublease, Vindex' alleged failure to return the keys to the premises is not dispositive of whether Vindex promptly vacated and surrendered possession (*Pezzo v 26 Seventh Ave. S., LLC*, 144 AD3d 778, 779 [2d Dept 2016] ["the tenant's failure to return the keys prior to the expiration of the lease did not show a failure to surrender"]).

Reclaim also seeks dismissal of Vindex's counterclaims for breach of the sublease, declaratory judgment, and return of the security deposit, and Vindex cross-moves for summary judgment. The factual issues raised by Vindex' submissions require denial of both the motion and cross-motion regarding a declaratory judgment of constructive eviction and return of the security deposit. As for the first counterclaim for breach of contract: pursuant to the sublease, Reclaim was obligated to assist Vindex in ensuring that Scribner fulfilled its obligations under the main lease (sublease, NYSCEF Doc. No. 26, ¶ 4 [a]). The documentary evidence submitted by the parties establishes that Reclaim was attempting to hold Scribner to its lease obligations, but Scribner failed to respond (Tufts aff., NYSCEF Doc. No. 24 ¶ 37; Tufts EBT tr, NYSCEF Doc. No. 35 at 53-55, 59-60; November emails, NYSCEF Doc. No. 53 at 5). In opposition, Vindex does not raise a triable issue of fact as to what other actions Reclaim should have taken to fulfill the requirement to cooperate with Vindex. Accordingly, Vindex cannot assert a counterclaim for breach of the sublease regarding this provision, as the record discloses no breach (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). With regard to the affirmative defenses, all but the third affirmative defense of constructive eviction are pled in conclusory fashion, with no supporting factual allegations (*Robbins v Grownney*, 229 AD2d 356, 358 [1st Dept 1996]) ("bare legal conclusions are insufficient to raise an affirmative defense").

Finally, Vindex cross-moves for summary judgment on its third-party claims against Scribner. “The rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]). However, in the absence of prejudice to the non-moving defendants, who have failed to appear, this is a technical defect which may be disregarded (*Sheehan v Marshall*, 9 AD3d 403, 404 [2d Dept 2004]). Vindex asserts two third-party causes of action against Scribner: breach of contract and a declaration of constructive eviction. As the court has previously stated in its opinion deciding Vindex’s motion for default judgment, the factual issues underlying Reclaim’s action against Vindex and the third-party action against Scribner are intertwined (decision and order, NYSCEF Doc. No. 40), necessitating denial of the motion with respect to the declaratory judgment claim. As for the breach of contract claim, the court has already granted Vindex judgment as to liability (*id.*), and no further action is necessary at this time.

Accordingly, it is hereby

ORDERED that plaintiff Reclaim’s motion for summary judgment is granted solely to the extent of dismissing the first counterclaim for breach of the sublease and first, second, and fourth through eighth affirmative defenses, and otherwise denied; and it is further

ORDERED that the first counterclaim and first, second, and fourth through eighth affirmative defenses are severed and dismissed; and it is further

ORDERED that defendant/third-party plaintiff Vindex’ cross-motion for partial summary judgment is denied; and it is further

ORDERED that counsel shall appear for a status conference in Room 1166, 111 Centre Street, New York, New York, on March 29, 2023, at 2:00 PM.

This constitutes the decision and order of the court.



<u>3/14/2023</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE