

Mercer Sq., LLC v Namdor, Inc.

2023 NY Slip Op 30912(U)

March 23, 2023

Supreme Court, New York County

Docket Number: Index No. 652272/2019

Judge: Arlene Bluth

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
COUNTY OF NEW YORK: PART 14

-----X

MERCER SQUARE, LLC,

Plaintiff,

- v -

NAMDOR, INC., GRISTEDE'S FOODS, INC.

Defendants.

INDEX NO. 652272/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

-----X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff's motion for summary judgment is denied and defendant's cross motion for summary judgment is denied.

Background

In this breach of contract action, plaintiff (a landlord) contends that defendants (a former tenant and guarantor) prematurely abandoned the commercial premises, and plaintiff now seeks to recover unpaid rent, emergency repairs, and related expenses.

Defendant Namdor Inc. is the tenant who leased the premises on West Third Street and Mercer Street and defendant Gristede's Foods, Inc. is the guarantor. Together, defendants operated the premises as Gristede's Supermarket. In August 2018, the New York State Division of Food Safety and Inspection Services inspected the supermarket and issued a report identifying the existence of mold in the ceiling panels. Defendants allege they promptly hired a roofing contractor to assess the roof and an environmental consulting firm to conduct mold testing. The

contractors noted the roof was in disrepair and the environmental consultants suggested closing the supermarket for 2 weeks to remediate the mold and repair roof leaks. At the end of the August 2018, defendants vacated the premises. According to plaintiff, it was given no notice of defendants vacatur of the premises.

In late September or early October, defendants notified plaintiff of the mold, and plaintiff contends it sent a roofer to inspect the premises on October 5, 2018. Plaintiff's roofer alleged the mold was originating from a leaking HVAC unit, which, pursuant to the parties' lease, is maintained by defendants. Plaintiff refused to fix the ceiling, alleging it was defendants' responsibility. In return, defendants sent an official notice in December 2018 claiming constructive eviction as of August 2018.

Plaintiff now moves for summary judgment on its claims and to dismiss defendants' affirmative defenses and counterclaims. Plaintiff contends defendants vacated the premises as of August 31, 2018, and according to the lease, defendants remain responsible for the rent through the lease's expiration (February 29, 2020). From the date of abandonment to February 29, 2020, plaintiff alleges the total rent due is \$641,206.98. Plaintiff further claims that defendants owe plaintiff additional rent for late fees and interest totaling \$100,168. Additionally, plaintiff alleges it is owed emergency repair expenses for having to repair the premises after defendants failed to continue paying heating and electric services, totaling \$103,069.88, as well as re-leasing expenses from putting the premises back in order for re-rental in the amount of \$174,139.45.

Plaintiff further contends all of defendants' affirmative defenses should be dismissed; however, defendants only offer argument in opposition to preserve three of their affirmative defenses. First, plaintiff argues defendants' ninth affirmative defense for constructive eviction should be dismissed because defendants failed to provide notice to the landlord of the mold in

the ceiling. Additionally, plaintiff claims defendants cannot demonstrate the mold is attributable to plaintiff instead of the HVAC unit that defendants were in charge of maintaining. Next, plaintiff argues that defendants' tenth affirmative defense for breach of the covenant of quiet enjoyment by constructively evicting defendants is duplicative of a claim for constructive eviction. Finally, plaintiff argues that defendants' eleventh affirmative defense, for breach of the maintenance and repair clause by failing to repair the roof. is duplicative of a constructive eviction claim and that defendants failed to demonstrate any proof that the roof was the source of the leaking.

In response, defendants allege the constructive eviction claim relieves them from liability for the unpaid rent. Defendants claim plaintiff cannot recover for the emergency repairs because the complaint does not allege any facts or causes of action relating to emergency repairs and defendants did not have notice to seek discovery related to such repairs. Furthermore, defendants contend each affidavit and report submitted by plaintiff presents are inadmissible.

Additionally, defendants cross-move for summary judgment on their ninth, tenth, and eleventh affirmative defenses/counterclaims. First, defendants contend they are entitled to summary judgment on their ninth affirmative defense because they demonstrated the roof was defective and caused leaks into the premises via a New York State Sanitation Report, various affidavits, and the environmental consultants' report. Additionally, defendants claim the roof leaks substantially interfered with tenant's use and enjoyment of the premises and landlord was obligated to repair the roof and failed to do so. Defendants next argue that plaintiff had actual notice of the roof defects as the mold was noticeable and it "repeatedly requested" that plaintiff repair the defective roof (NYSCEF Doc. No. 114 at 15). Furthermore, defendants contend that plaintiff offers no evidence that the mold was caused by HVAC condensation as plaintiff's

witnesses either have no personal knowledge of the facts or testified they did not observe the roof in 2018.

Defendants maintain they are entitled to summary judgment on their tenth affirmative defense, claiming the constructive eviction breached the quiet enjoyment clause of the lease. As for the eleventh affirmative defense, defendants allege plaintiff failed to repair the leaking roof, thus breaching the maintenance and repair clause of the lease and causing the constructive eviction. Finally, defendants move for sanctions against plaintiff for the destruction of critical evidence. According to defendants, plaintiff replaced the roof after the commencement of litigation and failed to preserve the roof as evidence.

In reply to defendants' opposition and in response to the cross-motion, plaintiff asserts that defendants admitted they did not provide plaintiff with proper notice of the constructive eviction and deprived plaintiff the opportunity to cure the defective condition. Therefore, defendants' ninth affirmative defense should be dismissed. Plaintiff maintains that defendants' evidence is wholly insufficient and failed to demonstrate proof of the roof's "excessive" leaks or that plaintiff is responsible for the mold, claiming that defendants' evidence indicates the presence of mold in other parts of the supermarket but never mentions the roof. Plaintiff further asserts that sanctions are improper because defendants submitted affidavits of individuals who had the opportunity to inspect the roof and defendants never requested additional inspections. Moreover, plaintiff contends it did not act in bad faith and roof replacement was part of renovations of the premises. Finally, plaintiff argues the complaint seeks recovery of all damages accrued as a result of defendants' default on the lease. According to plaintiff, such damages include emergency repairs.

In reply to plaintiff's response and in support of their cross-motion, defendants allege plaintiff failed to submit admissible evidence in its opposition to defendants' cross-motion. Moreover, defendants claim plaintiff failed to refute defendants' claim that plaintiff had actual notice of the leaky roof and mold. Defendants further assert their claim for sanctions for plaintiff's destruction of evidence is appropriate because successful sanctions claims do not require bad faith destruction of evidence, plaintiff had a duty to preserve the roof, and the spoliation of the roof prevents defendants' testifying expert from inspecting the roof to gather additional evidence. Finally, defendants contend plaintiff did not include recovery of emergency repairs in the complaint, and simultaneously did not submit proof that the emergency repairs were attributable to defendants' actions. Moreover, defendants argue allowing the claim for emergency repairs would be severely prejudicial to defendants because they did not seek discovery related to emergency repairs as defendants were not on notice of such a claim.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Constructive Eviction

“Constructive eviction exists where . . . the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises,” (*Barash v Pa. Terminal Real Estate Corp.*, 26 NY2d 77, 83, 308 NYS2d 649 [1970]).

Where a constructive eviction claim is based on a landlord's duty to repair, “[movant] must also show that the landlord knew, or should have known, about the need for repairs,” (*N.N. Intl. (USA) Corp. v Gladden Props. LLC*, 52 Misc. 3d 1206(A), 2016 NY Slip Op 51056(U) *9 [Sup Ct, NY County 2016]).

The Court declines to grant defendants' motion for summary judgment on their constructive eviction claim. Defendants allegedly first learned of the mold in August of 2018; however, the record before this Court suggests that they did not inform plaintiff of the mold until at least October. Because there is no conclusive proof that defendants promptly informed plaintiff about the mold, the Court is unable to grant summary judgment on the claim of constructive eviction. It is unreasonable to expect a landlord to be aware of and cure a defect in a

reasonable amount of time when the tenant failed to give proper notice of such a defect. If a landlord refuses to cure the defect, and a tenant must vacate the premises, then a constructive eviction has taken place. Defendants claim they were constructively evicted in August 2018 despite the fact that they point to no indisputable evidence, such as an email or letter, in which they informed their landlord of the mold issue. The date when defendants informed plaintiff of the mold is an issue of fact.

Breach of the Covenant of Quiet Enjoyment

“To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord’s conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises,” (*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250, 806 NYS2d 495 [1st Dept. 2005]).

As previously noted, there is an issue of fact as to when defendants informed plaintiff of the ceiling mold. Defendants did not submit any evidence that they informed plaintiff of the mold when they first learned of the presence of mold in the ceiling. The Court declines to grant summary judgment on this branch of defendants’ motion.

Breach of the Duty to Repair

The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Markov v Katt*, 176 AD3d 401, 402-403 [1st Dept 1995]).

In addition to issues of notice, there is a question of fact as to what was leaking and causing the mold. If it was the roof, then it was the landlord’s duty to repair; pursuant to the lease, “Landlord shall maintain and repair the public portions of the building, both exterior and interior,” (NYSCEF Doc. No. 90 at 1). On the other hand, if it was the HVAC unit, then it was

the tenant's duty to maintain (NYSCEF Doc. No. 90 at paragraph 50). Here, because it is unclear when defendants gave notice of the mold, and it is unclear what was leaking, it is unclear who was in breach of the contractual duty to repair. The date notice was given, and what leak caused the mold (if any) are clear issues of fact and are not for summary judgment.

Defendants' Motion for Sanctions

Pursuant to CPLR 3126, "if a court finds that a party destroyed evidence that ought to have been disclosed. . . , the court may make such orders with regard to the failure or refusal as are just," (*Ortega v City of New York*, 9NY3d 69, 76, 845 NYS2d 773 [2007]).

The Court declines to issue sanctions against plaintiff. Defendants contend plaintiff improperly destroyed the roof of the supermarket when plaintiff replaced it in preparation for a new tenant. Defendants have a report issued by a New York state official as well as reports by trained consultants who viewed the ceiling and roof long before this issue was ever litigated. Plus, defendants knew about the ceiling condition as it caused them to shut down their store; they had ample opportunity to document the ceiling. It is unreasonable to expect plaintiff to maintain the building in moldy and decrepit condition for months while this case unfolds. Moreover, plaintiff re-let the premises to mitigate its damages. This Court does not find that plaintiff's conduct is sanctionable.

Plaintiff's Motion for Summary Judgment

The Court declines to grant plaintiff's motion for summary judgment on its claims for rent arrears. Defendants supplied testimony from multiple individuals who alleged the leaks in the ceiling were attributable to a defective roof. An environmental consulting firm submitted a

report stating that it “recommends roof removal and replacement prior to any mold abatement, in order to eliminate roof leakage, which the probable reason for the mold found at the subject property,” (NYSCEF Doc. No. 100 at 1). Each accompanying affidavit was submitted by an individual with personal knowledge of the ceiling mold—Mr. D’Amico as Senior VP of defendants and inspected the premises, Ms. Flores as Executive VP of defendants and similarly inspected the premises in August 2018, and the accompanying affidavits of the consultants who analyzed the roof and mold prior to litigation. Plaintiff offered no affidavits of individuals with personal knowledge of the condition of the roof and submitted only testimony that constitutes hearsay.

The Leichter affidavit relied on information given to him by other individuals who saw the supermarket ceiling tiles. Leichter relied on two reports—one from contractor Bob Laquidara and one from building inspector Miguel Rivera. Plaintiff never submitted Mr. Rivera as an expert and his report is devoid of information about his qualification as a potential expert (NYSCEF Doc. No. 56). The other report, supposedly written by Bob Laquidara, was contained in an email from Michael Barton that was sent to plaintiff’s counsel (NYSCEF Doc. No. 61). Mr. Laquidara did not sign or swear to the truth of the email or to the report contained in the email. There is no affidavit or other indication that Mr. Laquidara himself submitted this report, and this Court cannot make a finding about the authenticity of the report or the email itself. In short, the only affirmation submitted by plaintiff that is not procedurally flawed is the one written by plaintiff’s counsel; however, this is not enough. For this reason, the Court cannot grant summary judgment to plaintiff.

Accordingly, it is hereby

ORDERED that defendants' cross motion for summary judgment on their ninth affirmative defense/first counterclaim, tenth affirmative defense/second counterclaim, eleventh affirmative defense/third counterclaim, and for sanctions against plaintiff is denied; and it is further

ORDERED that plaintiff's motion for summary judgment is denied.



3/23/2023
DATE

ARLENE BLUTH, 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