

Century City Mall, LLC v Waxman

2023 NY Slip Op 32756(U)

July 27, 2023

Supreme Court, New York County

Docket Number: Index No. 654961/2019

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

Defendant further argues that plaintiff repudiated its lease with tenant because defendant simultaneously solicited and approved third-party, Barbuto Mare LLC's demolition and construction plans for the same premises, and the plans named Barbuto Mare LLC as the "tenant," but plaintiff, however, failed to approve, disapprove or comment upon tenant's demolition plans for same. (*id.*, at ¶41-43; NYSCEF Doc. Nos. 74; 75, *Barbuto Mare Demolition Plans*).

Plaintiff, in opposition, denies defendant's claim that the premises were not delivered in "delivery conditions", but rather, that he delivered, and tenant took possession of the premises in "delivery conditions" on May 25, 2017. Plaintiff further argues that on May 25, 2017, he delivered to tenant and defendant a "Delivery Notice" via Federal Express and an e-mail which provided that: "[t]his letter shall serve as notice that Space No. 1797 (the 'Premises') shall be delivered on May 25, 2017, for the commencement of Tenant's Work" (NYSCEF Doc. No. 9, *opposition*, pg 9). To this point, plaintiff proffers the affidavit of J. Scott Priester, the Senior Director of Tenant Coordination for the Mall, and same is owned by plaintiff, in which he avers that plaintiff delivered keys of the premises to tenant via defendant on July 12, 2017, and tenant moved its personal property into the premises in early September 2017 (NYSCEF Doc. No. 80, *J. Scott Priester's affidavit in opposition*, ¶16-18). That said, plaintiff contends that by moving kitchen equipment and supplies into the premises by early September 2017, tenant conceded that plaintiff had delivered the premises in "deliverable conditions," and thus, substantially completed its work, which includes "[a] basic building structure, common use corridors, main electrical service distribution system, sanitary sewer service, and fire sprinkler service" (NYSCEF Doc. No. 9, at pg 6, 10).

Plaintiff posits that at no point did defendant specify that plaintiff had not substantially completed its work even though it asked defendant about same. Plaintiff maintains that in or about October 2017, tenant and defendant approached landlord about installing a Barbuto Mare restaurant in the premises rather than a California-style Waxman's Bar & Grill ("WB&G"), as contemplated in the lease. Plaintiff claims that beginning in April 2018, the parties exchanged drafts of a proposed assignment of the lease from tenant to Barbuto LLC ("Proposed Assignment") which was ultimately never executed but envisioned that defendant and his business partner, Phillip Scotti, be jointly liable as guarantors under the proposed assignment. Plaintiff argues that it made clear to tenant and defendant that unless and until the proposed assignment was formally executed, tenant remained liable under the original lease, and defendant remained liable under the original guaranty (*id.*, at pg 13-14). Plaintiff further asserts that, after failing to obtain the funding necessary to open a Barbuto restaurant and having failed to make rental payments while remaining in exclusive control of the premises, defendant, on behalf of tenant, notified plaintiff on January 1, 2019, that it would vacate the premises. The affidavit of Louis Schillace, the Senior Shopping Center Manager for the Mall, buttresses plaintiff's claim that tenant did not pay rent for occupying the premises from March 14, 2018, through October 2018. (NYSCEF Doc. No. 69, *affidavit of Louis Schillace*). Therefore, plaintiff argues that defendant's summary judgment motion should be denied because issues of material fact exist as to whether the premises were delivered to tenant; whether the rental commencement date was triggered; and whether the landlord repudiated the lease.

In reply, defendant asserts that plaintiff does not rebut his claim that landlord disapproved tenant's demolition plans for the premises and rather approved demolition and construction plans for the premises submitted by Barbuto Mare, LLC, as the tenant, which were submitted at landlord's behest (NYSCEF Doc. No. 109, *reply*, ¶1-12). Defendant further argues that plaintiff conflates the "commencement date" and "delivery conditions" as envisioned under the lease because the "commencement date" is the date that the lease is signed and tenant is given the limited right of access to inspect the premises, and this limited right of access is not possession. Defendant maintains that "delivery conditions," on the other hand, entails the substantial completion of landlord's responsibilities such that tenant can occupy the premises after delivery, and because landlord did not address the demolition plans for the premises tenant had submitted, but instead approved the demolition and construction plans submitted by the third-party, Barbuto Mare, LLC, it reneged on pursuing the lease it had signed with tenant (*id.*, at ¶19-21). That said, defendant claims that the fact that plaintiff gave keys to the premises to guarantor on July 12, 2017, does not demonstrate "delivered possession," because after the commencement date, tenant was entitled to keys to the premises.

Contrary to plaintiff's claim that it was never notified that any portion of its work was incomplete, defendant argues that plaintiff was notified via e-mail that the premises was not compliant with the fire-safety code and therefore, approval and sign-off from the Fire Department was required (*id.*, at ¶26). Defendant further contends that plaintiff's position that, by moving equipment into the premises, tenant commenced work and thereby conceded that plaintiff's responsibility to deliver the premises in "delivery conditions" were satisfied, is meritless because the lease required that tenant's work be commenced only after the landlord's approval of the final drawings, which never occurred. Defendant maintains that assuming *arguendo* tenant (and not Barbuto Mare, LLC) performed work, that would not establish that plaintiff's work was substantially complete, that the "delivery conditions" were met, or that plaintiff delivered possession to tenant because Section 5.01 of the lease expressly grants tenant's limited right of access from and after the commencement date, prior to satisfaction of the "delivery conditions" (*id.*, at ¶27-30).

It is well-settled that the proponent of a summary judgment motion 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 (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

"Anticipatory repudiation occurs when, before the time for performance has arisen, a party to a contract declares his intention not to fulfill a contractual duty" (*Kaplan v Madison Park Group Owners, LLC*, 94 AD3d 616, 618-619 [1st Dept 2012].)

Here, upon review of the record, and notwithstanding defendant's claims that the rental commencement date did not occur, and that plaintiff landlord repudiated the contract when it approved Barbuto Mare LLC's demolition and construction plans for the premises, issues of fact

preclude summary judgment. The affidavits of Schillace and Priester claim that landlord delivered the keys to the premises to tenant on July 12, 2017, and tenant moved its equipment into same. Defendant’s claim that plaintiff did not deliver the premises in “delivery conditions” and hence, tenant never commenced its work is belied by an e-mail from Gabriel Freiberg, an agent of defendant who identifies himself as “Waxman’s GM”, to Schillace, in which Freiberg requests to “coordinate a delivery of restaurant equipment and supplies to our space [the premises].” Insofar as the e-mail suggests that tenant intended to move restaurant equipment and supplies to the premises, which exceeds permitted conduct under Section 5.01(b) of the lease, which states that that “[a]ny occupancy of the Premises by Tenant prior to the date on which the Delivery Conditions are satisfied shall be solely for the purpose of inspection, measurement and obtaining information necessary to prepare Plans and Specifications and to construct its leasehold improvements” (NYSCEF Doc. No. 91, 8/31/17 e-mail), there is an issue of fact as to whether the premises was delivered in “delivery conditions”.

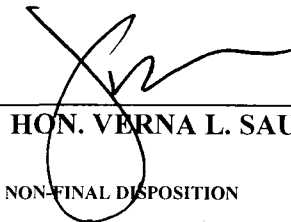
Likewise, defendant’s claim that plaintiff repudiated its lease with tenant by soliciting and approving third-party, Barbuto Mare LLC’s demolition and construction plans of same is rebutted by the unexecuted Proposed Assignment wherein the parties were discussing the possibility of assigning the lease between plaintiff and tenant to Barbuto Mare LLC (NYSCEF Doc. No. 99, *proposed assignment*), and plaintiff has further claimed that it made clear to tenant and defendant that unless and until the proposed assignment was formally executed, tenant remained liable under the original lease, and defendant liable as guarantor. Therefore, defendant’s motion for summary judgment is denied. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that defendant’s motion, pursuant to CPLR 3212, for summary judgment against plaintiff for dismissal of the complaint is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendant; and it is further

This constitutes the decision and order of the Court.

July 27, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE