

57th & 7th Assoc., L.P. v Osborne Tenants Corp.

2023 NY Slip Op 32762(U)

August 9, 2023

Supreme Court, New York County

Docket Number: Index No. 154866/2022

Judge: Paul A. Goetz

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. PAUL A. GOETZ **PART** **47**

Justice

-----X

57TH & 7TH ASSOCIATES, L.P.

Plaintiff,

- v -

OSBORNE TENANTS CORP.,

Defendant.

-----X

INDEX NO. 154866/2022

MOTION DATE 05/22/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for DISMISS.

Plaintiff 57th & 7th Associates, LP, the prime tenant, commenced this action against defendant Osborne Tenants Corp., the landlord, seeking a Yellowstone injunction based on defendant’s notice to cure dated May 5, 2022, which alleges four violations of the master lease: (1) plaintiff is in violation of paragraph 37 of the master lease because it is obstructing and encumbering the sidewalk and using it for purposes other than ingress and egress; (2) plaintiff is in violation of paragraph 3 of the master lease which prohibits tenant from displaying any lettering, signs or advertisements on the outside of the building without landlord’s written consent; (3) plaintiff is in violation of paragraph 37 of the master lease which prohibits obstructing or encumbering the common area in the building cellar; (4) plaintiff is in violation of paragraph 3 of the second amendment to the master lease by permitting its subtenant to store garbage in the alleyway. By order dated October 31, 2022, this court granted plaintiff’s motion for a Yellowstone injunction. Defendant Osborne now moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint and vacate the injunction. Plaintiff cross-moves to consolidate this

action with three related actions pending in this court which were commenced by its subtenants and in which this court also issued Yellowstone injunctions (Index Nos. 155138/2022, 155143/2022, 155205/2022).

Initially, plaintiff contends that defendant's motion is untimely as it was filed after defendant served its answer and counterclaims. Contrary to plaintiff's contention, defendant's motion is not untimely. Under CPLR 3211(e) as a motion to dismiss for failure to state a cause of action can be made at any time and defendant preserved its right to move to dismiss based on documentary evidence by asserting this defense in its answer.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the pleading must be afforded a liberal construction and the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). However, the Court of Appeals has made clear that a defendant can submit documentary evidence in support of a CPLR 3211(a)(7) motion. *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 (2014) (citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976)). "When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff has stated a cause of action to whether it has one." *Id.* (internal quotations and citations omitted). Thus, if the defendant's evidence conclusively establishes that the plaintiff has no cause of action, dismissal would be appropriate. *Id.* Similarly, "a motion pursuant to CPLR 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law." *Stone v. Bloomberg LP*, 163 A.D.3d 1028, 1030-31 (2d Dep't 2018).

With regard to the first alleged violation of the master lease, paragraph 37 provides that the “sidewalks, entrances, passages, courts, elevators, halls, vestibules, stairways, corridors or halls shall not be obstructed or encumbered by Tenant or used for any purpose other than ingress and egress to and from the demised premises” Affirmation of Joseph Dimitrov dated May 22, 2023, Exh. C, para. 37. The sidewalk sheds violate this provision and plaintiff does not argue otherwise. Instead, plaintiff argues that defendant permitted its subtenants to erect and maintain the sidewalk sheds by failing to object to the structures until September 2021. In a similar vein, plaintiff argues that defendant waived its objection to the sidewalk sheds by continuing to accept rent with knowledge of the violation.

Waiver is the voluntary relinquishment of a known right (*Excel Graphics Technologies Inc. v. CFG/AGSCB 75 Ninth Avenue, LLC*, 1 A.D.3d 65, 69 [1st Dep’t 2003]). However, parties to a commercial lease may mutually agree that conduct which might otherwise give rise to an inference of waiver shall not be deemed a waiver of a specific bargained for provisions in a lease (*Id.* at 70). Here, the master lease contains a nonwaiver clause which explicitly provides that a party’s failure to insist upon the strict performance of any term of the lease, including the acceptance of rent, shall not constitute a waiver of any such breach. Dimitrov Aff., Exh. C, Rider, para. Twenty-second D. In light of the clear and unambiguous general nonwaiver clause in the lease, the defendant’s acceptance of rent did not constitute a waiver. Accordingly, to the extent plaintiff’s claims are based on the outdoor seating, they must be dismissed and the Yellowstone injunction vacated to the extent that it is premised on protecting plaintiff’s use of the sidewalks for outdoor dining as there is no issue for future determination.

With regard to the second alleged violation of the master lease, paragraph 3 of the master lease provides that plaintiff “shall not display or erect any lettering, signs, advertisements,

awnings or other projections . . . without the prior written consent of the landlord.” Dimitrov Aff. Exh. C, para. 3. However, paragraph ninth of the rider to the lease provides that the landlord “consents to the maintenance of existing or similar signs in and on the demised premises” Dimitrov Aff., Exh. C, Rider, para. Ninth. Thus, defendant’s evidence does not conclusively show that the subtenant’s signage is a violation of the lease. In any event, it appears that most of the signage was voluntarily removed by the subtenants at the plaintiff’s request. Affirmation of Daniel Ansell dated July 12, 2023, paras. 16, 21. Accordingly, the claims will not be dismissed on this basis.

With regard to the third violation based on the storage of items in certain portions of the basement, this issue is moot as the items have been removed. Ansell Aff., para. 35. With regard to the fourth violation based on the storage of garbage containers in the alleyway, paragraph three of the second amendment to the master lease provides that the tenant’s subtenants “shall not have the right to place refuse or rubbish in the rear yard or exterior of the premises or in any area of the basement other than in the basement area leased to the tenant.” Dimitrov Aff., Exh. C, Second Amendment to Lease, para. 3. Thus, the storage of garbage containers in the alleyway is a violation of lease and in fact, plaintiff’s sublessee agreed to relocate the containers. Ansell Aff., para 36. Accordingly, the motion to dismiss will be granted on this basis.

Finally, plaintiff’s cross-motion to consolidate this case with three related actions commenced against it by its subtenants must be denied. While the cases are indisputably related, consolidation is improper as plaintiff herein appears as a defendant in the related actions. Accordingly, it is

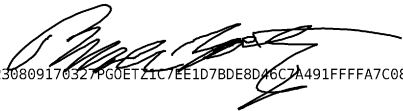
ORDERED that defendant’s motion to dismiss is granted to the extent that (1) the first and second causes of action are dismissed to the extent that they are based on plaintiff’s assertion

that it is entitled to maintain outdoor seating and store garbage in the alleyway; (2) the third and fourth causes of action based on an alleged defective notice to cure are dismissed; (3) and the motion is otherwise denied; and it is further

ORDERED that the Yellowstone injunction dated October 31, 2022 is vacated to the extent that it is premised on protecting plaintiff's use of the sidewalks for outdoor dining and the storage of garbage in the alleyway; and it is further

ORDERED that Yellowstone injunction is vacated, effective 60 days from the service of notice of entry of this order, so as to afford plaintiff an opportunity to move to vacate the Yellowstone injunctions in the related cases, which motions shall be filed by order to show cause, and to afford the subtenants an opportunity to remove the violations; and it is further

ORDERED that the cross-motion for consolidation is denied.


20230809170327PG0ETZ1C7EE1D7BDE8D46C7A491FFFFA7C08F51

<u>8/9/2023</u> DATE			<u>PAUL A. GOETZ, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE