

451-453 Park Ave. S. Corp. v Lifelab, LLC

2023 NY Slip Op 32898(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 654845/2020

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

451-453 PARK AVENUE SOUTH CORP.,

Plaintiff,

- v -

LIFELAB, LLC and SPARTAN BRANDS, INC.

Defendants.

-----X

INDEX NO. 654845/2020

MOTION DATE 8-21-23

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158

were read on this motion to/for STRIKE JURY DEMAND.

In this action commenced on September 30, 2020, the plaintiff landlord seeks money damages for breach of two commercial lease agreements with the defendants, a pair of former tenants in the plaintiff's building. In their answer, the defendants asserted two counterclaims seeking a judgment declaring that they did not breach the lease and money damages for the plaintiff's alleged acts of commercial tenant harassment and failure to perform repairs and improvements required under the lease terms. The plaintiff filed a Note of Issue on April 18, 2022, requesting a non-jury trial. On April 26, 2022, the defendants filed a demand for a jury trial. The matter was placed on the trial calendar and a date for jury selection was initially scheduled for February 27, 2023. The date was adjourned while the parties' respective motions for summary judgment were pending.

By an order dated June 6, 2023, the court, *inter alia*, granted the plaintiff's motion for summary judgment to the extent of granting judgment in favor of the plaintiff on liability for unpaid rent accrued prior to September 30, 2020, and granted the defendants' cross-motion for summary judgment on its first counterclaim to the extent of dismissing the plaintiff's breach of contract claims insofar as they seek unpaid rent accrued after September 30, 2020.

On July 21, 2023, the plaintiff moved to strike the jury demand filed by the defendants on the ground that the leases each contain a clause waiving defendants' right to a jury trial. The defendants oppose the motion by way of a Memorandum of Law in which they argue that an exception or exemption to the jury trial waiver applies under RPAPL §259-c or New York City Admin. Code § 22-902(a) so as to entitle them to a jury trial on the plaintiff's claims and their counterclaims. The plaintiff's motion is granted.

Clauses in a lease providing for the waiver of a jury trial in actions arising out of that lease are generally enforceable (see Sherry Assoc. v Sherry-Netherland, Inc., 273 AD2d 14, 15 [1st Dept. 2000]; 11 Park Place Assoc. v Barnes, 204 AD2d 170, 170 [1st Dept. 1994], *lv dismissed* 83 NY2d 1000 [1994]; Paralegal Inst., Inc. v Big Sol Mfg. Co., Inc., 190 AD2d 595 (1st Dept. 1993), provided the action does not involve a personal injury or property damage claim. See RPAPL § 259-c; Benjamin, Inc. v Trump CPS, 289 AD2d 113, 113 (1st Dept. 2001). Here, plaintiff has demonstrated that the present action, including the counterclaims, arises out of alleged breaches of the subject leases, as opposed to a personal injury or property damage claim. See CPLR 4102; Chemical Bank v Stahl, 258 AD2d 352 (1st Dept. 1999). As such, the waiver clauses found in the lease are applicable. See Stahl v Chemical Bank, 258 AD2d 352 (1st Dept. 1999).

As the parties challenging the jury waiver clauses, the defendants must demonstrate an "adequate basis to deny enforcement" of the clause. Fordham Univ. v Manufacturers Hanover Trust Co., 145 AD2d 332, 333 (1st Dept. 1988). The defendants have not met that burden. They argue that the jury waiver clause should be voided based on either the property damage or personal injury exception of RPAPL §259-c. However, their counterclaim alleging that some property belonging to the defendants was damaged through the landlord's negligence or lack of repairs is essentially a claim that the plaintiff breached the lease. Nor is there any "personal injury" exception under RPAPL 259-c since the purported acts of harassment do not involve any personal injury. Indeed, in that regard, the complaint merely alleges that after the defendants served their notice of early termination, the plaintiff entered into and took photographs of the premises, reduced unspecified building services and limited access to the freight elevator. These factual allegations are quite thin and no affidavit is submitted in opposition to this motion. For the same reason, the defendants' reliance on New York City Admin. Code § 22-902(a) to allege that the plaintiff engaged in "vindictive harassment" warranting a jury trial is unavailing. In any event, a party may not "avoid its contractual commitment to waive a jury trial by the simple

expedient of combining a cause of action in tort, whether real or spurious.” Fowler Court Tenants Inc. v Young, 119 Misc 2d 492 (Civ Ct, NY County May 2, 1983) [internal citations omitted]. As correctly argued by the plaintiff, the core of the entire matter, including the two counterclaims, arise out of the subject leases.

Even if the subject leases did not contain a waiver clause, the defendants’ request for declaratory relief in their counterclaims, being equitable in nature (see Anesthesia Assocs. of Mount Kisco, LLP v Northern Westchester Hosp. Center, 59 AD3d 481 [2nd Dept. 2009]; (Phoenix Garden Rest., Inc. v Chu, 234 AD2d 233 [1st Dept. 1996]), could constitute a waiver of the right to a jury trial. See New Media Holding Co., LLC v Kagalovsky, 118 AD3d 68, 79 (1st Dept. 2014); Wathne Imports, Ltd. V PRL USA, Inc. 129 AD3d 555 (1st Dept. 2015); Posner v S. Paul Posner 1976 Irrevocable Family Trust, 260 AD2d 268 (1st Dept. 1999); Paralegal Inst., Inc. v Big Sol Mfg. Co., Inc., *supra*.

While a motion to strike a jury demand is to be made “in a timely manner” (CDC Dev. Prop., Inc. v Am. Indep. Paper Mills Supply Co., Inc. 184 AD3d 625, 626 [2nd Dept. 2020]) or within a “reasonable time period” after the demand is made (A.J. Fritschy Corp. v Chase Manhattan Bank, 36 AD2d 600 [1st Dept. 1971]), it can be made “at any time up to the opening of trial.” Moyal v Sleppin, 139 AD3d 605 (1st Dept. 2016). The plaintiff did not move to strike the jury demand until more than a year after it was filed. It has been held that a delay in seeking that relief “may preclude a party from relying on a contractual waiver of the right to trial by jury”. Sapp v Propeller Co., LLC, 12 AD3d 218, 219 (1st Dept. 2004). However, under the “liberal standards of CPLR 4102(e)” (Ossory Trading v Geldermann, Inc., 200 AD2d 423, 423-424 [1st Dept. 1994]), delay can be excused if there is no resulting prejudice. See Moyal v Sleppin, *supra* at 605-606. Here, there is no resulting prejudice as, *inter alia*, both parties had moved for summary judgment prior to the filing of the jury demand and the plaintiff promptly moved to strike it after the motions were decided. See Moyal v Sleppin, *supra*; 55th Management Corp. v Goldman, ___ Misc2d ___, 2001 WL 1744142 (App Term 1st Dept. Nov. 19, 2001). The defendants identify no prejudice in their memorandum in opposition and, indeed, do not address the delay issue at all.

The court has considered the defendants’ remaining contentions and finds them to be without merit.

Accordingly, upon the foregoing papers, it is

ORDERED that the plaintiff's motion to strike the jury demand filed by the defendants on April 26, 2022, is granted and the jury demand is hereby stricken, and it is further

ORDERED that the plaintiff shall serve a copy of this order on the Trial Support Office within 20 days, and it is further,

ORDERED that the parties shall appear in Part 40 for a settlement conference on December 4, 2023, at 9:30 a.m., as previously scheduled.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

8/21/2023
DATE

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