

Wilmington Trust, N.A. v Elmwood NYT Owner, LLC

2024 NY Slip Op 32816(U)

July 10, 2024

Supreme Court, New York County

Docket Number: Index No. 850176/2020

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE BENEFIT OF THE HOLDERS OF CD 2016-CD2 MORTGAGE TRUST COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2016-CD2, WILMINGTON TRUST, NATIONAL ASSOCIATION, AS TRUSTEE, FOR THE BENEFIT OF THE REGISTERED HOLDERS OF JPMDB COMMERCIAL MORTGAGE SECURITIES TRUST 2017-C5, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-C5, DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CITIGROUP COMMERCIAL MORTGAGE TRUST 2017-P7, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-P7, and WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE REGISTERED HOLDERS OF CD2017-CD3 MORTGAGE TRUST, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2017-CD3,

INDEX NO. 850176/2020
MOTION DATE N/A
MOTION SEQ. NO. 026

DECISION + ORDER ON MOTION

Plaintiffs,

- v -

ELMWOOD NYT OWNER, LLC, LANDINGS NYT OWNER, LLC, OAKWOOD NYT OWNER, LLC, WALLKILL NYT OWNER, LLC, BOARD OF MANAGERS 229 WEST 43RD STREET CONDOMINIUM, CRIMINAL COURT OF THE CITY OF NEW YORK, and GLOBAL SECURITY GROUP INC.,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 026) 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 396 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this foreclosure action involving the original New York Times building, where the court appointed a receiver, The Ribbon Worldwide 44 LLC (the Ribbon), a tenant restaurant in the building, moved for a *Yellowstone* injunction, and to amend its answer and cross-claims. (NYSCEF Doc. No. [NYSCEF] 373, Proposed Order to Show Cause

at 2-3.¹) The court denied the *Yellowstone* injunction for the reasons stated on the record February 5, 2024. (NYSCEF 390, Order to Show Cause; NYSCEF ___, Tr ___.)²

“The party requesting a *Yellowstone* injunction must demonstrate that: ‘(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.’” (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 514 [1999] [citation omitted].)

The Ribbon must show its “ability to cure a rent default, if that is the basis of the landlord’s action against the tenant, or the injunction will be denied.” (*LIDC I v Sunrise Mall, LLC*, 46 Misc 3d 885, 888 [Sup Ct, Nassau County 2014] [citation omitted].) The Ribbon has not paid its monthly rent since 2021 and has not shown an ability to cure its defaults nor a desire to cure. As explained on February 5, 2024, the Ribbon’s “proof” of increasing profits is facially insufficient. (NYSCEF 378-380, incomplete and out-of-date financial statements.) Accordingly, the court is compelled to deny the Ribbon’s motion for a preliminary injunction.

The Ribbon also moves to amend its answer. It asserts that receiver Klaus Kretschmann (Receiver), as successor to the landlord under the lease, violated the lease by erecting scaffolding during roof and façade projects and by maintaining the scaffolding around the building from December 2018 to October 2023. (NYSCEF 382, Amended Answer with Cross-Claims ¶¶ 52, 54.) The Ribbon insists that the protective measures blocked visibility of the restaurant, interfered with the aesthetic appeal of the restaurant, causing reduction in patronage. (*Id.* ¶ 18.) The Ribbon proposes cross-

¹ NYSCEF pagination.

² The Ribbon is directed to submit the February 5, 2024 transcript to be so ordered.

claims for: (1) injunctive relief; (2) a declaratory judgment that the Ribbon is not in default under the lease; (3) breach of contract; (4) breach of the covenant of good faith and fair dealing; (5) breach of quiet enjoyment; (6) violation of General Business Law § 349;³ and (7) tenant harassment. (*Id.* ¶¶ 34-79.)

Pursuant to CPLR 3025(b), “[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” Generally, leave to amend a pleading is freely granted “absent prejudice or surprise resulting from any delay” in asserting the proffered claim. (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978] [citations omitted].) “[L]eave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, ‘palpably insufficient or clearly devoid of merit’ and thus should not be permitted under CPLR 3025.” (*Olam Corp. v Thayer*, 2021 WL 408232, 2021 NY Misc LEXIS 476, 2021 NY Slip Op 30345[U], *3-4 [Sup Ct, NY County 2021].)

The Receiver objects to the Ribbon’s motion to amend because the Ribbon failed to seek leave of court to assert its original cross-claims on April 12, 2021 when the Ribbon filed an answer with cross-claims. (NYSCEF 82, Answer with Cross-Claims.)

The order appointing the Receiver provides:

“ORDERED, that no person or entity shall file against the Receiver, or take other action against the Receiver, without an order from this Court permitting the legal action; provided, however, that no prior court order is required to file a motion in this action to enforce the provisions of this Order or any other order of this Court in this action.” (NYSCEF 65, Receivership Order at 10.)

³ Tenant withdrew this claim at argument on February 23, 2024. (NYSCEF 399, tr at 3:23-4:3.)

The court rejects the Receiver's argument as the reasons for the order is not present when the case is before the appointing judge.

"The rule that leave of the appointing court be obtained before suing such a receiver was devised in order to protect the receiver and the estate against the harassment and expense of possibly unnecessary litigation and to preserve the estate in the hands of the receiver for the benefit of all creditors It arose also from the fact that, because the property is held by the receiver as an officer of the court, or as it is sometimes said, as the hand of the court, interference with the property by the bringing of an action without leave may constitute contempt." (*Copeland v Salomon*, 56 NY2d 222, 228 [1982] [citations omitted].)

Failure to obtain permission to assert claims, or here cross-claims, against the receiver is not fatal. (*Id.*) The motion to amend is effectively seeking leave. Accordingly, the court moves on to consideration of the Ribbon's proposed cross-claims.

The second proposed cross-claim for a declaratory judgment that tenant is not in breach of the lease because of the Receiver's initial breach due to the scaffolding is precluded by section 6.7 of the lease which provides:

"Except as expressly set forth in this Lease, Landlord shall not be liable in any way to Tenant for any failure, defect or interruption of, or change in the supply, character and/or quantity of, service furnished to the Premises for any reason, nor shall there be any allowance to Tenant for a diminution of rental value, nor shall the same constitute an actual or constructive eviction of Tenant, in whole or in part, or relieve Tenant from any of its Lease obligations...." (NYSCEF 376, Lease § 6.7.)

The second cross-claim is dismissed.

As to its breach of contract claim, the third proposed cross-claim, the Ribbon asserts that the Receiver has violated sections 15.3 and 23.3 of the lease "because he did *not* use all reasonable efforts to diligently and expeditiously proceed to complete such façade and roof work requiring such obstructions and to remove the Protective

Measures promptly.” (NYSCEF 382, Amended Answer with Cross-Claims ¶ 52.) The Ribbon seeks lost profits. (*Id.* ¶ 56.)

Section 15.3 of the lease applies only “[i]f Landlord erects or consents to the erection of scaffolding on the sidewalk in front of or adjacent to the Premises.” (NYSCEF 376, Lease § 15.3.) “In such event, Landlord agrees, pending Condominium Board approval (which Landlord shall promptly use commercially reasonable efforts to obtain), to: ... (iii) perform such inspection, construction, maintenance, or repair as diligently and expeditiously as reasonably practicable....” (*Id.*) The Receiver denies that he erected the scaffolding insisting that the building’s condominium board controls such measures, including whether and when to remove it. (NYSCEF 392, Kretschman aff ¶ 10.) While the Receiver’s affidavit does not constitute documentary evidence (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]), the Bylaws clearly support the Receiver’s contention. As to the Receiver’s consent to the scaffolding, the Bylaws clearly provide that the Receiver’s consent was not required. (NYSCEF 393, Bylaws §§ 8.4.2, 2.2.3[m].) While consent was not required, a question of fact exists as to whether the Receiver did in fact consent. Further, there is a question of fact as to whether the Receiver took all measures necessary to encourage the condominium to work expeditiously. However, the Ribbon’s § 15.3 claim fails because § 15.3 does not provide for any liability except for limited signage expenses. (NYSCEF 376, Lease § 15.3.) Since the Ribbon seeks only lost profits, this part of its proposed cross-claim based on § 15.3 is dismissed.

Section 23.3 of the lease is limited by § 6.7 of the lease. Under § 6.7 of the lease,

“Except as expressly set forth in this Lease, Landlord shall not be liable in any way to Tenant for any failure, defect or interruption of, or change in the supply, character and/or quantity of, service furnished to the Premises for any reason, nor shall there be any allowance to Tenant for a diminution of rental value, nor shall the same constitute an actual or constructive eviction of Tenant, in whole or in part, or relieve Tenant from any of its Lease obligations, and no liability shall arise on the part of Landlord by reason of inconvenience, annoyance or injury to business, whether electricity or gas or water is provided by public or private utility, or by any electricity generation system owned and operated by Landlord. Notwithstanding anything to the contrary contained in this Lease with the exception of Articles relating to casualty and condemnation, respectively, if due to any Landlord Party’s acts, omissions (where there is a duty to act), negligence or willful misconduct but without the willful misconduct or negligence of Tenant, or any person claiming through or under Tenant, a Substantial Portion (as hereinafter defined) of the Premises is rendered Untenantable (as hereinafter defined) for a period of two (2) or more consecutive days after Tenant shall have first notified Landlord of such untenability (which notice, for purposes of this Section 6.7 only, may be verbal, provided that Tenant confirms such verbal notice by a notice given in accordance with Article 26 within twenty-four (24) hours immediately following the giving of such verbal notice), by reason of Landlord’s access in and to the Premises, in connection with any Landlord Repairs, Restorative Work or any stoppage or interruption of any Essential Service (as hereinafter defined) required to be provided by Landlord under this Lease, or the failure by Landlord to perform any of Landlord’s obligations hereunder (but excluding by reason of a casualty or other Unavoidable Delay or Tenant Delay) and Tenant is not in occupancy of the Substantial Portion of the Premises so affected, then for the period commencing on the day Tenant notifies Landlord that such Substantial Portion of the Premises became Untenantable until the date such Substantial Portion of the Premises is no longer Untenantable, Fixed Rent and Additional Rent shall be appropriately abated, on a per square foot basis, with respect only to such Substantial Portion of the Premises, as Tenant’s sole right and remedy. ‘Untenantable’ means that Tenant shall be unable to use the Premises, or the affected portion thereof, for the conduct of its business in the manner in which such business is ordinarily conducted for the Permitted Use (as the same was being used during the period immediately prior to such occurrence), and shall not be using or in occupancy of the Premises, or the affected portion thereof... Tenant shall be entitled to a credit against the Fixed Rent and Additional Rent becoming due in an amount equal to the amount of such reduction. ‘Essential Service’ shall mean (a) intentionally omitted, (b) electrical service, (c) freight elevator service and the loading dock, (d) water and sewer, (e) condenser water and steam, (f) legal compliance to the extent Tenant is unable to use the Premises for the Permitted Use (as the same was being used during the period immediately prior to such occurrence), but only if such legal compliance is the obligation of Landlord hereunder, (g) if the windows of the Premises are darkened or covered not by reason of any third party, which third party shall include, without limitation, any Governmental Authority, and (h) if

Tenant cannot access the Premises in accordance with the provisions of this Lease. ‘Substantial Portion’ shall mean any portion of the Premises (x) consisting of at least fifteen (15%) percent of SF (the Rent shall be abated on a pro-rata per square foot basis as to that portion of such floor of the Premises that is Untenantable) then comprising the Premises, or (y) which prevents or materially and adversely restricts Tenant from conducting Tenant’s business in the ordinary course at the Premises for the Permitted Use including, without limitation, the portion of the Premises used as a kitchen.”⁴ (NYSCEF 376, Lease § 6.7 [emphasis added].)

The Ribbon admittedly continued to operate, albeit at an alleged slower pace; the premises were not rendered untenable in whole or in part. If the premises were untenable, the Ribbon would be entitled to an abatement, not lost profits. Therefore, in the absence of permissible damages, this part of the third proposed cross-claim is denied.

However, the Ribbon is not relying on the general provisions of § 6.7, but the specific provision § 23.3 which is excepted from § 6.7. Section 23.3 provides:

“If, at any time or from time to time, any windows of the Premises are temporarily blocked, darkened or bricked-up for any reason whatsoever outside of Landlords reasonable control ... or by Landlord in connection with the performance of repairs, maintenance or improvements to the Building, or if required by any Legal Requirements, or if any of such windows are permanently blocked, darkened or bricked-up if required by any Legal Requirement or by reason of any construction upon property adjacent to the Real Property by parties other than Landlord, or another Landlord Party ... Landlord shall not be liable for any damage Tenant may sustain thereby and Tenant shall not be entitled to any compensation therefor nor abatement of Fixed Rent or Additional Rent nor shall the same release Tenant from its obligations hereunder nor constitute an eviction or constructive eviction of Tenant from the Premises, unless the same unreasonably impairs Tenants access to or use or occupancy of the Retail Unit for the Permitted Use as expressly provided in this Lease, determined on a commercially reasonable basis. Subject to the terms and conditions of Section 6.7 hereof, Landlord shall use all reasonable efforts not to unreasonably interfere with Tenant’s ordinary business operations at the Premises for the Permitted Use in connection with the foregoing work and shall use all reasonable efforts to diligently proceed to complete such work requiring such obstructions.” (*Id.* § 23.3 [emphasis added].)

⁴ The Receiver’s recitation of this provision was incomplete and misleading.

An issue of fact exists as to the Receiver's "reasonable efforts." The Ribbon's motion to amend is granted as to the third cross-claim insofar as the violation of § 23.3 of the lease is alleged.

"[I]mplicit in every contract is a covenant of good faith and fair dealing ... which encompasses any promises that a reasonable promisee would understand to be included." (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 318 [1995] [citation omitted].) As discussed on the record on February 23, 2024, the Ribbon's fourth proposed cross-claim for breach of the covenant of good faith and fair dealing is dismissed because it is duplicative of the breach of contract cross-claim. (See *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011].) The Ribbon fails to identify duties distinct from a contractual duty.

The Ribbon's motion to amend its answer to add a cross-claim for breach of quiet enjoyment is denied. The Ribbon fails to address this claim in either of its memoranda of law. In any case, "[i]n the absence of a sufficient allegation of 'an eviction, actual or constructive, there is no breach of the covenant of quiet enjoyment.'" (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 [1st Dept 2006] [citation omitted] [affirming dismissal of claim and explaining that "[t]o prevail on a cause of action for breach of the covenant of quiet enjoyment, a tenant 'must show an ouster or if the eviction is constructive, an abandonment of the premises'" (citation and alteration omitted)].) The fifth cross-claim is dismissed.

The Ribbon's seventh cross-claim is dismissed as to violation of Administrative Code § 22-902(a)(9), which prohibits a landlord from "substantially interfering with a commercial tenant's business by commencing unnecessary construction or repairs on

or near covered property.” (Administrative Code § 22-902[a][9].) The condominium, not the Receiver, commenced and controlled the Local Law 11 work. (NYSCEF 392, Kretschmann aff ¶ 10; NYSCEF 393, Bylaws §§ 8.4.2, 2.2.3[m].) Regardless, the Ribbon concedes that the façade work was “necessary.” (NYSCEF 382, Amended Answer with Cross-Claims ¶ 73.)

Likewise, the Ribbon’s cross-claim under Administrative Code § 22-902(a)(10), which prohibits a landlord from “engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant’s business” is dismissed. (Administrative Code § 22-902[a][10].) The condominium, not the Receiver, commenced and controlled the Local Law 11 work.

Finally, the Ribbon’s proposed cross-claim under Administrative Code § 22-902(a)(14), which prohibits a landlord from “attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to §22-1005 of [the Administrative Code],” is dismissed. (*Id.* § 22-902[a][14].) The proposed cross-claims are silent regarding enforcement of a personal guaranty. Indeed, the Ribbon fails to mention the Receiver’s action that is currently pending in this Court to enforce the personal guaranty of the Ribbon’s principal, Ken Sturm (Index No. 654388/2022).

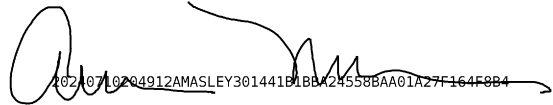
Accordingly, it is

ORDERED that the preliminary injunction is denied; and it is further

ORDERED that The Ribbon Worldwide 44 LLC’s motion 026 to amend the answer and cross-claims is granted as to the third cross-claim for breach of contract under § 23.3 of the lease and otherwise denied. The motion to amend is denied as to

first, second, fourth, fifth, sixth, and seventh cross-claims and the part of the third cross-claim that is for breach of contract under § 15.3 of the lease; and it is further

ORDERED that The Ribbon Worldwide 44 LLC shall submit the February 5, 2024 transcript to be so ordered.



7/10/2024
DATE

ANDREA MASLEY, 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