

Tareb v 65th St., LLC

2024 NY Slip Op 33214(U)

September 11, 2024

Supreme Court, Kings County

Docket Number: Index No. 512562/2024

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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FUAD N. TAREB,

Plaintiff,

Decision and order

- against -

Index No. 512562/2024

65TH STREET, LLC,

Defendant,

September 11, 2024

-----X
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #2

The defendant has moved seeking to dismiss the complaint pursuant to CPLR §3211. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

According to the complaint, on December 3, 2021 the plaintiff tenant entered into a commercial lease with the defendant landlord concerning space utilized as a deli and grocery store located at 6224 4th Avenue in Kings County. The plaintiff renovated the premises and asserts the renovations as well as the new equipment cost approximately \$800,000. The plaintiff has commenced this action seeking recovery of \$800,000 arguing an oral agreement was entered into between the parties wherein the defendant agreed to pay for the renovations and equipment.

The plaintiff instituted this lawsuit alleging breach of contract, breach of good faith and fair dealing, a reformation of the contract and other claims. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Perez v. Y & M Transportation Corporation, 219 AD3d 1449, 196 NYS3d 145 [2d Dept., 2023]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Archival Inc., v. 177 Realty Corp., 220 AD3d 909, 198 NYS2d 567 [2d Dept., 2023]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Lam v. Weiss, 219 AD3d 713, 195 NYS3d 488 [2d Dept., 2023]).

The defendant argues that pursuant to the merger clause contained within the lease these claims are not viable. That clause states that "no modification, termination or surrender of this Lease or surrender of the Demised Premises or any part thereof or of any interest therein by Tenant shall be valid or effective unless agreed to and accepted in writing by Landlord, and no act by any representative or agent of Landlord, other than such a written agreement and acceptance, shall constitute an acceptance thereof" (see, Standard Form of Store Lease, Rider, ¶80 [NYSCEF Doc. No. 6]). It is true that a merger clause which

states the agreement represents the entire understanding between the parties is "to require full application of the parole evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (Primex International Corp., v. Wal-Mart Stores Inc., 89 NY2d 594, 657 NYS2d 385 [1997]). Thus, there can be no oral modifications changing the terms of the lease. The plaintiff argues that, essentially, the parties entered into a new oral agreement that entirely superceded the lease. However, it cannot seriously be argued that a new agreement was entered into between the parties thereby nullifying the lease itself. Clearly, the lease, with all its myriad provisions controls the duties and rights of the parties. Therefore, pursuant to Paragraph 80 of the rider any changes required a writing. The nature of the change is immaterial. Indeed, there is little distinction between a modification and a superceding event. Any superceding event, such as renovations and an abatement of rent and any modification, such as renovations and an abatement of rent, result in the same change. Thus, there can be no reasonable reliance upon any oral communications allegedly made since a writing was required by the lease (Aris Industries Inc., v. 1411 Trizechahn-Swig LLC, 294 AD2d 107, 744 NYS3d 362 [1st Dept., 2002]). Therefore, there can be no oral agreement the parties entered into which change the terms of the lease.

The plaintiff next argues that there are questions of fact

whether the renovations were structural and were thus the responsibility of the defendant. It is true that the lease permits the tenant to make non-structural changes to the premises upon notice and approval of the owner and that the owner is obligated to make all structural repairs to the interior and exterior of all public portions of the building (see, Standard Form of Store Lease, ¶¶3,4 [NYSCEF Doc. No. 6]). Thus, while the term 'structural' is not defined in the lease the defendant is not required to pay for any structural renovations initiated by the plaintiff. The lease merely requires the tenant to pay for non-structural renovations. It does not mandate the owner must pay for such structural renovations. It is true that the work report of the building consultant includes work that may be classified as structural including plumbing and gas replacements and electrical work (see, Work Report [NYSCEF Doc. No. 7]), however, again, there is no requirement the landlord must pay for voluntary renovations undertaken by the tenant. Likewise, there is no basis to assert the parties agreed to any sort of rent abatement. Any oral modification in this regard is similarly improper. Therefore, there is no basis to impose any of the financial obligations upon the defendant at all.

Although, as previously indicated there can be no claims concerning the renovations and improvements and new equipment, there are questions whether the landlord waived the non-payment of rent by failing to seek such rent for more than a year and a

half. In general, a waiver, which is the relinquishment of a right, can be voluntarily agreed upon by either party (Jefpaul Garage Corp., v. Presbyterian Hospital, 61 NY2d 442, 474 NYS2d 458 [1984]). Thus, a waiver is unilateral and "not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform" (Nassau Trust Co., v. Montrose Concrete Products Corp., 56 NY2d 175, 451 NYS2d 663 [1982]). In Stassa v. Stassa, 123 AD3d 804, 999 NYS2d 116 [2d Dept., 2014] the court held that where a continuing obligation between two parties exists and one party waived their rights, that party's filing of a summons and complaint in an action to assert those same rights is indicative that such waiver was withdrawn. Consequently, there are questions whether the landlord waived the payment of rent and of course withdrew the waiver at some point in time. Thus, the motion seeking to dismiss the first, second and fifth causes of action is granted. The motion seeking to dismiss the fourth cause of action related to rent payments owed is denied.

Turning to the third cause of action seeking to reform the lease, in Snell v. Atlantic Fire and Marine Insurance Company, 98 US 85, 8 Otto 85, 25 L.Ed. 52 [1878] the Supreme Court held that where an insurance "contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed"

then reformation of the contract is appropriate. To hold otherwise, the court explained, would allow the "insurance company to obtain an unconscionable advantage, through a mistake, for which its agents were chiefly responsible" (id). A mutual mistake exists where both parties "share the same erroneous belief and their acts do not in fact accomplish their mutual intent" (Healy v. Rich Products Corp., 981 F.2d 68 [2d. Cir. 1992]). Thus, to succeed upon a claim for reformation of a written agreement upon the grounds of mutual mistake, the party seeking reformation must establish, by clear and convincing evidence "the agreement does not accurately express the parties' intentions or previous oral agreement" (313-315 West 125th Street LLC v. Arch Specialty Insurance Company, 138 AD3d 601, 30 NYS3d 74 [1st Dept., 2016]).

In this case there is no mutual mistake at all. To the extent a waiver exists, as noted, the fourth cause of action adequately protects the tenant's interests in that regard. Therefore, the motion seeking to dismiss the reformation cause of action is granted.

Next, to establish a cause of action for promissory estoppel it must be shown that the defendant made a clear and unambiguous promise upon which the plaintiff reasonably relied to his or her detriment (Skillgames LLC v. Brody, 1 AD3d 247, 767 NYS2d 418 [1st Dept., 2003]). However, the existence of a contract between the parties precludes the existence of any promissory estoppel

(Pope Contracting Inc., v. New York City Housing Authority, 214 AD3d 519, 186 NYS3d 150 [1st Dept., 2023]). Thus, the cause of action alleging promissory estoppel is granted.


The last cause of action alleges commercial tenant harassment. However, that cause of action is only available if the harassment is unlawful. In this case the termination of the lease was based upon the non-payment of rent. That is not unlawful and all and cannot constitute any harassment.

Therefore, based on the foregoing, the defendant's motion seeking to dismiss the entire complaint is granted except for the fourth cause of action.

So ordered.

ENTER:

DATED: September 11, 2024
Brooklyn NY



Hon. Leon Ruchelsman
JSC