

Amazonas, Inc. v 37-69 103rd Street, LLC
2015 NY Slip Op 30445(U)
March 16, 2015
Sup Ct, Queens County
Docket Number: 26694 2011
Judge: Thomas D. Raffaele
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS RAFFAELE

IA Part 13

AMAZONAS, INC., x

Index
Number 26694 2011

Plaintiff,

Motion Date November 7, 2014

-against-

Motion Seq. Nos. 3, 4, 5, 6

37-69 103rd STREET, LLC, x

The following papers numbered 1 to 40 read on this motion by defendant (Motion Seq. No. 3) for an order granting summary judgment dismissing the complaint and granting summary judgment on its counterclaim for attorney's fees. Plaintiff separately moves for an order extending the time in which to file the note of issue (Motion Seq. No 4); for an order striking the defendant's answer, precluding the defendant from offering testimony/evidence at trial, and in the alternative for a conditional order of preclusion and compelling the defendant and its attorneys to comply with discovery demands by a date certain; extending the time in which to file the note of issue; and awarding attorney's fees (Motion Seq. No. 5); and for an order pursuant to CPLR 203(e), 305(c) and 3025(b) for leave to amend the caption in order to add Ruben Pena as a defendant, to add new causes of action for declaratory judgment, equitable estoppel, unjust enrichment, fraudulent inducement, restitution and the return of the security deposit; and deleting the original first and second causes of action (Motion Seq. No. 6).

	<u>Papers Numbered</u>
Notice of Motion-Affidavit-Affirmations-Exhibits.....	1-5
Opposing Affirmation-Affidavit-Exhibits.....	6-9
Reply Affirmation-Exhibit.....	10-12
Order to Show Cause-Affirmation-Exhibits.....	13-15
Emergency Affirmation.....	16
Affirmations of Service.....	17-18
Opposing Affirmation-Exhibits.....	19-21

Notice of Motion-Affirmations-Exhibits.....	22-26
Opposing Affirmation.....	27-29
Notice of Motion-Affirmation-Affidavit-Exhibits.....	30-34
Opposing Affidavit-Affirmation-Exhibits.....	35-37
Reply Affirmation-Exhibits.....	38-40

Upon the foregoing papers these motions are consolidated for the purposes of a single decision and order and are determined as follows:

On December 23, 2009, plaintiff Amazonas, Inc., as tenant, and defendant 37-69 103rd Street, LLC, as landlord, entered into a five year lease for the premises known as 37-69 103rd Street, Corona, New York, commencing January 1, 2010 and expiring on December 30, 2014. The lease by its terms provided that the tenant “shall use and occupy demised premises for DELI/GROCERY STORE ONLY and for no other purpose.” Paragraph 30 of the lease also provided that the tenant would operate the business as a Deli/Grocery store only. The leased space included an enclosed backyard.

The certificate of occupancy for the subject premises is for a one family dwelling with two stores, and the portion of the property leased to the plaintiff was residential. Upon taking occupancy the tenant began to renovate the property in order to operate a commercial business on the first floor and obtain a new certificate of occupancy.

Plaintiff commenced this action on November 25, 2011, and alleges in its complaint that pursuant to the subject lease agreement it was to operate a deli/grocery at the subject premises; that it intended to serve hot and cold Spanish foods and Spanish grocery items; that it intended to obtain a beer and wine cooler license; and that it sought said license in order to permit its customers to consume said alcoholic beverages while consuming food on the premises.

Plaintiff alleges that prior to commencing operations at the subject premises it began renovations on the ground floor; that its contractors advised it that there were certain violations pending against the premises; that these violations were discussed with the landlord and that the landlord agreed to make all necessary repairs and correct all outstanding violations; that the landlord failed to make said repairs and correct the violations; and that this resulted in the tenant’s inability to obtain a beer and wine cooler license. Plaintiff alleges that said license is essential to its business; that it lost substantial sums to its competitors; and that the landlord has refused to permit it to cancel the lease, surrender the premises and return the security deposit. The first cause of action seeks to cancel the lease and obtain a refund of the security deposit. The second cause of action seeks to recover damages in the sum of \$500,000.00, consisting of money invested in

renovating the premises totaling \$270,000.00, as well as loss of business and moving expenses.

Defendant has served an answer and interposed eleven affirmative defenses and a counterclaim for attorney's fees pursuant to the terms of the lease.

In April 2012, the landlord, 37-69 103rd Street, LLC, commenced a non-payment proceeding in Civil Court, Queens County against the tenant Amazonas Inc. The landlord asserted that the tenant ceased paying the rent on September 1, 2011. On July 27, 2012, the landlord obtained a final judgment of possession of the subject premises, and a money judgment in the sum of \$26,600.00.

The proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562, [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Once such a showing is made, the burden shifts and the party opposing the motion must tender evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which would require a trial or tender an acceptable excuse for his or her failure to do so (*see Zuckerman*, 49 NY2d at 557).

Defendant herein asserts that there is nothing in the parties' lease which makes it contingent upon plaintiff being able to obtain a beer and wine cooler license; that the lease provided that plaintiff was to use the premises as deli/grocery only; and that did not concern the right, desire, or ability of plaintiff to operate a cafe/restaurant and to obtain a liquor license in order to sell beer and/or wine coolers at the premises.

Pursuant to the terms of the lease, plaintiff took possession of the premises in an "As Is" physical condition, and it was "agreed that Landlord shall not be obligated to make any improvements, alterations or repairs to the demised premises except repairs to the roof of the premises unless the damage to the roof is caused by tenant and/or its employees, agents and/or assigns." The lease also provided that the "Tenant at Tenant's sole cost and expense, shall promptly comply with all present and future laws, orders and regulations of all state, federal, municipal and local governments, departments, commissions and boards...which shall impose any violation, order or duty upon Owner or Tenant with respect to the demised premises...".

Immediately after the tenant took possession in December 2009, it began to make renovations to the leased premises, and obtained certain permits from the Department of

Buildings, including a permit in connection with the conversion from a residential premises to a commercial store that expired on February 24, 2010. In April 2010 and in July 2012, while the tenant was in occupancy, the New York City Department of Buildings (DOB) issued notices of violation with respect to the subject premises.

Defendant in support of the within motion has submitted printouts from the DOB website which indicates that all notices of violation issued prior to April 2010 were dismissed or closed, and that the only open violations were the ones issued in April 2010 and July 2012. The April 2010 violation concerns the installation of a walk-in commercial refrigerator at the rear of the premises, without a permit. The July 2012 violation is for occupying the building without a valid certificate of occupancy, and refers to the building permit obtained by plaintiff that expired on February 24, 2010. Defendant asserts that it was plaintiff's obligation under the lease to cure said violations, and that it did not enter into an oral agreement with the plaintiff to cure said violations. It is further asserted that to the extent that plaintiff asserts that defendant orally agreed to cure any violations prior to entering the lease, any such oral agreement is barred by the lease's merger clause.

With respect to plaintiff's attempts to obtain a liquor license, defendant asserts that the plaintiff purportedly submitted a liquor license application to the local Community Board in September 2009, which was noticed to be heard on October 7, 2009, more than 2 months prior to the date of the lease. However, no liquor license was issued as a result of said application, and there is no evidence that the Community Board or the State Liquor Authority made any determination with said application.

Defendant asserts that as of September 1, 2011, the tenant ceased paying rent, purportedly as a result of its inability to obtain a liquor license. However, on October 1, 2011, plaintiff executed a liquor license application which it sought to have reviewed at a Community Board meeting on November 9, 2011. Said meeting was adjourned to December 2011, and there is no evidence that the 2011 application for a liquor license was ever formally adjudicated by either the Community Board or State Liquor Authority.

To the extent that plaintiff claims that its failure to obtain a liquor license was the result of its failure to obtain a new certificate of occupancy, defendant asserts that it was the tenant's responsibility under the lease to cure the violations and obtain the proper authorizations for a new certificate of occupancy.

Plaintiff, in opposition, asserts that outstanding violations which had been pending for years prior to the commencement of the lease, were the responsibility of the landlord; that because said violations had not been cured, the DOB would not issue a new

certificate of occupancy, which resulted in the effective denial of the plaintiff's application for a beer and liquor license. Plaintiff, however, has not submitted any documentary evidence in support of this claim.

Plaintiff also asserts that defendant's motion for summary judgment is defective, as defendant failed to attach a copy of its answer to its moving papers. Defendant has attached a copy of the answer to its reply, and as this omission was due to an oversight, said motion will be considered on the merits.

To the extent that plaintiff's opposition repeats the claims asserted in the proposed amended complaint regarding the alleged validity of the lease and deed, these claims are not properly before the court and do not raise any triable issues of fact. Moreover, the proposed amended complaint deletes the only two causes of action asserted herein.

This court, therefore, finds that defendant has established, *prima facie*, its right to summary judgment dismissing the complaint, and that plaintiff in opposition thereto has failed to raise a triable issue of fact which would warrant the denial of summary judgment. Therefore, that branch of defendant's motion for summary judgment dismissing the complaint (Motion Seq. No 3), is granted.

That branch of Motion Seq. No. 3 which seeks summary judgment on the counterclaim for attorney's fees, is denied. To the extent that the counterclaim is predicated upon paragraph 19 of the lease agreement, said paragraph does not provide for the payment of attorney fees incurred in the defense of any and all actions that may be commenced by the tenant against the landlord. Defendant thus has failed to establish, *prima facie*, its right to recover attorney's fees pursuant to the lease agreement under the circumstances presented herein. As a motion for summary judgment searches the record, the plaintiff's claim for attorneys' fees (Motion Seq. 5) is similarly dismissed (CPLR 3212).

Plaintiff's separate motions to amend the complaint (Motion Seq. No. 6), for an order extending the time in which to file the note of issue (Motion Seq. No 4); and for an order striking the defendant's answer, precluding the defendant from offering testimony/evidence at trial, and in the alternative for a conditional order of preclusion and compelling the defendant and its attorneys to comply with discovery demands by a date certain; extending the time in which to file the note of issue; and awarding attorney's fees (Motion Seq. No. 5), are denied, as moot.

Dated: March 16, 2015

THOMAS D. RAFFAELE, J.S.C.